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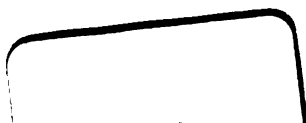
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140

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature

OF THE
STATE OF INDIANA,
WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES
CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Ass't Reporter.

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TABLE OF THE CASES

REPORTED IN THIS VOLUME.

Abshire et al. v. Williamson.248	City of Huntington v. Cast et al.....255
Baker, Durflinger v.....375	City of Huntington, Chicago, etc., R. R. Co. v.....518
Baltimore, etc., R. W. Co. v. Conoyer .....524	City of Indianapolis, Lilly et al. v.....648
Baltimore, etc., R. W. Co., Kerner, Admx., v..... 21	City of Michigan City, Peck v. ....670
Baltimore, etc., R. W. Co. v. Little, Admx.....167	City of Shelbyville v. Phillips.552
Barnett et al. v. Bromley Mfg. Co. et al.....606	City of Terre Haute et al. v. Evansville, etc., R. R. Co...174
Bass et al., Ewing v..... 1	Clark v. Marlow et al..... 41
Beach et al., Pomeroy et al. v.511	Claypool et al., Indianapolis Brewing Co. v.....193
Beckner, Helwig v.....131	Cleveland, etc., R. W. Co. v. Miller, Admr.....490
Bishop v. State, ex rel. Griner.223	Conoyer, Baltimore, etc., R. W. Co. v.....524
Board of Commissioners of Cass Co. et al. v. Plotner...116	Cowen v. Failey, Rec.....382
Bourne et al., Royse et al. v..187	Cunningham, French v.....632
Boyer v. Robertson et al..... 74	Davis et al. v. Talbot et al... 80
Bromley Mfg. Co. et al., Barnett et al. v.....606	Dill et al., Miller et al. v....326
Byall, Fitch v.....554	Dill, Pearce et al. v.....136
Cast et al., City of Huntington v.....255	Drake v. Schoenstedt..... 90
Cathcart et al., Finley v.....470	Dudley et al. v. Pigg.....363
Chandler et al. v. Citizens' National Bank of Evansville.601	Dunn et al. v. Dunn et al...424
Chapman et al. v. Jones et al.434	Durflinger v. Baker .....375
Chicago, etc., R. R. Co. v. City of Huntington.....518	Edwards et al., Pullen et al. v.....710
Chicago, etc., R. W. Co. v. McBeth et al..... 78	Ellsesser et al., Mickels et al. v.....415
Citizens' National Bank of Evansville, Chandler et al. v..601	Evansville, etc., R. R. Co., City of Terre Haute et al. v...174
Citizens State Bank of Noblesville et al. v. Harris....208	Evansville, etc., R. R. Co. v. State, ex rel. Town of Ft. Branch .....276
City of Bloomington v. Phelps et al.....596	Ewing v. Bass et al..... 1
City of Ft. Wayne et al. v. Ft. Wayne, etc., R. R. Co..... 25	Failey, Rec., Cowen v.....382

Farnsworth et al., Haney v.	453	Jones, Exr., v. Henderson et al.	458
Finley v. Cathcart et al.	470	Kates, State v.	46
First Nat'l Bank of Frankfort v. Smith et al.	443	Keesling, Treas., et al. v. Powell	372
Fitch v. Byall	554	Keesling, Treas., et al. v. Winfield	709
Franklin National Bank et al. v. Whitehead et al.	560	Kerner, Admx., v. Baltimore, etc., R. W. Co.	21
French v. Cunningham	632	Lackey, Harrison Building, etc., Co. v.	10
Fritch v. Patterson et al.	455	Lake Erie, etc., R. R. Co. Jamison, by Next Friend, v.	521
Ft. Wayne, etc., R. R. Co., City of Ft. Wayne et al. v.	25	Leach v. Rains et al.	152
Funk v. State	338	Leach et al. v. Mattix, Admx.	146
Gainey et al. v. Gillson, Rec.	58	Leschen v. Guy	17
Garrett v. State, ex rel. Huntsinger	264	Lilly et al. v. City of Indianapolis	648
Gary et al., Moore, Admr., v.	51	Little, Admx., Baltimore, etc., R. W. Co. v.	167
Gillson, Rec., Gainey et al. v.	58	Lunsford et al., Graham et al. v.	83
Gott v. State	708	Manns Brothers, etc., Co. et al. v. Templeton et al.	706
Graham et al. v. Lunsford et al.	83	Manor, Aud., v. State, ex rel. Stoltz, Tr.	310
Grzesk et al. v. Hibberd, Tr.	354	Marlow et al., Clark v.	41
Guy, Leschen v.	17	Mattix, Admx., Leach et al. v.	146
Halter, State, ex rel. Goodman v.	292	McBeth et al., Chicago, etc., R. W. Co. v.	78
Hamlet Hay Co., New York, etc., R. R. Co. v.	344	McCue v. McCue	466
Hamlin, Tate v. (Opinion on Submission.)	94	McFarlan v. State	149
Hamlin, Tate v. (Principal Opinion.)	107	McFarland, State, ex rel. Morris, v.	266
Haney v. Farnsworth et al.	453	McKee et al., Pullen et al. v.	709
Hannan v. State	81	McPheeters, Admr., Holmes v.	597
Harris, Citizens State Bank of Noblesville et al. v.	208	Meridian National Bank et al., Shepard, Rec., v.	20
Harrison Building, etc., Co. v. Lackey	10	Meridian National Bank et al., Shepard, Tr., v.	532
Hart v. State	585	Mickels et al. v. Ellsesser et al.	415
Helwig v. Beckner	131	Miller v. State	607
Henderson et al., Jones, Exr., v.	458	Miller, Admr., Cleveland, etc., R. W. Co. v.	490
Hibberd, Tr., Grzesk et al. v.	354	Miller et al. v. Dill et al.	326
Hines, Sheffer et al. v.	413	Moats et al., Wayne International Building and Loan Association v.	123
Holmes v. McPheeters, Admr.	587	Moore, Admr., v. Gary et al.	51
Indianapolis Brewing Co. v. Claypool et al.	193		
In re Petition of Stroth, Sheriff of DeKalb Co.	164		
Jackson v. Jackson	238		
Jamison, by Next Friend, v. Lake Erie, etc., R. R. Co.	521		
Jones et al., Chapman et al. v.	434		

TABLE OF CASES REPORTED.

v

New Pittsburg Coal and Coke Co., Peterson v.....	260	State, Siberry v.....	684
New York, etc., R. R. Co. v. Hamlet Hay Co.....	344	State, Skelton v.....	641
Opp et al. v. Timmons et al.....	236	State, Thistlethwaite et al. v.....	319
Patterson et al., Fritch v.....	455	State, ex rel. Ballard et al. v. Wilson, Tr.....	253
Pearce et al. v. Dill.....	136	State, ex rel. Goodman v. Halter	292
Peck v. City of Michigan City.....	670	State, ex rel. Griner, Bishop v.....	223
Peterson v. New Pittsburg Coal and Coke Co.....	260	State, ex rel. Huntsinger, Garrett v.....	264
Phelps et al., City of Bloomington v.....	596	State, ex rel. Ketcham, Att'y-Gen., Starr, Treas., v.....	592
Phillips, City of Shelbyville v.....	552	State, ex rel. Morris v. McFarland	266
Pigg, Dudley et al. v.....	363	State, ex rel. Stoltz, Tr., Manor, Aud., v.....	310
Plotner, Board of Commissioners of Cass Co. et al. v.....	116	State, ex rel. Town of Ft. Branch, Evansville, etc., R. Co. v.....	276
Pomeroy et al. v. Beach et al.....	511	State, ex rel. Utz, Relender v.....	283
Powell, Keesling, Treas., et al. v.	372	Stewart et al., Pullen et al. v.....	710
Pullen et al. v. Edwards et al.....	710	Stroh, Sheriff of DeKalb Co., In re Petition of.....	164
Pullen et al. v. McKee et al.....	709	Sweet & Clark Co. et al. v. Union National Bank of Troy, N. Y.....	305
Pullen et al. v. Stewart et al.....	710		
Putt et al. v. Putt et al.....	30		
		Talbot et al., Davis et al. v... ..	80
Rains et al., Leach v.....	152	Tate v. Hamlin et al. (Opinion on Submission).....	94
Reeves et al., Richards v.....	427	Tate v. Hamlin et al. (Principal Opinion.)	107
Reid v. Reid et al.....	274	Templeton et al., Manns Brothers, etc., Co. et al. v... ..	706
Relender v. State, ex rel. Utz.....	283	Thistlethwaite et al. v. State.....	319
Richards v. Reeves et al.....	427	Thomas v. Thompson.....	391
Riley v. State.....	48	Thompson, Thomas v.....	391
Ritchey et al. v. Welsh.....	214	Timmons et al., Opp et al. v.....	236
Robertson et al., Boyer v.....	74	Town of Boswell v. Wakley.. ..	64
Boyse et al. v. Bourne et al.....	187		
		Union National Bank of Troy, N. Y., Sweet & Clark Co. et al. v.	305
Schoenstedt, Drake v.....	90		
Sheffer et al. v. Hines.....	413	Wakley, Town of Boswell v. . .	64
Shepard, Rec., v. Meridian National Bank et al.....	20	Wayne International Building and Loan Association v. Moats et al.....	123
Shepard, Tr., v. Meridian National Bank et al.....	532	Welsh, Ritchey et al. v.....	214
Shields v. State.....	395	Whitehead et al. Franklin National Bank et al. v.....	560
Siberry v. State.....	684	Williamson, Abshire et al. v.....	248
Skelton v. State.....	641	Wilson, Tr., State, ex rel. Ballard et al. v.....	253
Smith et al., First Nat'l Bank of Frankfort v.....	443	Winfield, Keesling, Treas., et al. v.....	709
Starr, Treas., v. State, ex rel. Ketcham, Att'y-Gen.....	592		
State, Funk v.....	338		
State, Gott v.....	708		
State, Hannan v.....	81		
State, Hart v.....	585		
State v. Kates.....	46		
State, McFarlan v.....	149		
State, Miller v.....	607		
State, Riley v.....	48		
State, Shields v.....	395		

TABLE OF THE CASES

CITED IN THIS VOLUME.

Abell v. Riddell, 75 Ind. 345..414	Avery v. Slack, 17 Wend. 85..603
Adams v. Cosby, 48 Ind. 155..638	Aydelott v. Collings, 144 Ind. 602
Adams v. Harrington, 114 Ind. 66	425
Adams v. Hopkins, 5 Johns. 252	Ayers v. Armstrong, 142 Ind. 263
150	559, 593
Adams v. Merchants National Bank, 9 Biss. 396.....	Babcock v. Fitchburg R. R. Co., 140 N. Y. 308.....
582, 583	508
Albert v. State, ex rel., 65 Ind. 413	Badger v. Mayer, 8 Misc. 533.635
461, 462	Balley v. Glover, 21 Wall. (U. S.) 342.....
Alexander v. Mortgage Co., 47 Fed. 131.....	245
463	Balley v. Rinker, 146 Ind. 129. 77
Alley v. City of Lebanon, 146 Ind. 125.....	Baker v. Bradley, 7 De Gex. M. and G. 595.....
518	9
Ames v. Lake Shore, etc., R. W. Co., 135 Ind. 363.....	Baldwin v. Hosmer, 101 Mich. 432
262	384
Ammerman v. Crosby, 26 Ind. 451	Baltimore, etc., R. R. Co. v. Lansing, 52 Ind. 229.....
133, 134	179
Amos v. State, 29 Tenn. 117..	Baltimore, etc., R. W. Co. v. Young, 146 Ind. 374.....
343	526
Anderson v. Hubble, 93 Ind. 570	Balue v. Richardson, 124 Ind. 490
371	369
Anderson v. Wilson, 100 Ind. 405	Bank of Westfield v. Inman, 133 Ind. 287.....
605	103
Archibald v. Long, 144 Ind. 451	Barber, etc., Co. v. Edgerton, 125 Ind. 455.....
367, 378	599
Arundel v. McCulloch, 10 Mass. 70.....	Barkley v. Tapp, 87 Ind. 25..
674	364
Asevado v. Orr, 100 Cal. 293..	Barnard v. Brown, 112 Ind. 53
134	212, 214
Ashley v. Foreman, 85 Ind. 55	Barnett v. Harshbarger, 105 Ind. 410.....
381	161
Ashuelot R. R. Co. v. Elliot, 58 N. H. 451.....	Barnett v. State, 100 Ind. 171.406
180	Barron v. Mayor, etc., 2 Am. Jurist, 203.....
Astley v. Capron, 89 Ind. 167.515	673, 676
Atkinson v. Dalley, 107 Ind. 117	Bartalott v. International Bank, 14 Ill. App. 148.....
406, 408	245
Austin v. Willson's Executors, 21 Ind. 252.....	Bartholomew v. Pierson, 112 Ind. 430.....
552	16
Avery v. Akins, 74 Ind. 283	Bass v. City of Fort Wayne, 121 Ind. 389.....
420, 421, 422. 485	176, 186
Avery v. Dougherty, 102 Ind. 443	Bayless v. Glenn, 72 Ind. 5....
14	354

TABLE OF CASES CITED.

vii

Beach v. Norton, 8 Conn. 71..	21	Board, etc., v. Pearson, 120	
Beaty v. Vories, 138 Ind. 285.	459	Ind. 426	688
Bedford Belt R. W. Co. v.		Board, etc., v. Plotner, 149	
Brown, 142 Ind. 659.....	24	Ind. 116.....	601
Beekman v. Saratoga, etc., R.		Board, etc., v. Pressly, 81 Ind.	
R. Co., 3 Paige 45.....	180	361	165
Behreley v. Behreley, 98 Ind.		Board, etc., v. State, 61 Ind.	
255	161	379	260
Bellinger v. N. Y. Cent. R. R.		Board, etc., v. State, ex rel.,	
Co., 23 N. Y. 42.....	349	108 Ind. 497	461
Belshaw v. Chitwood, 141 Ind.		Board, etc., v. Wagner, 138	
377	378	Ind. 609.....	352
Belt R. R., etc., Co. v. Mann,		Bocard v. State, ex rel., 79	
107 Ind. 89.....	499	Ind. 270	546
Bender v. Wampler, 84 Ind.		Bonomi v. Backhouse, E. B. &	
172	459	E. 622.....	683
Berlin v. Oglesbee, 65 Ind.		Boody v. United States, 3 Fed.	
308	369	Cas. 860	228
Bessette v. State, 101 Ind. 85.	402	Borland v. Mayo, 8 Ala. 104..	451
Bevis v. Heflin, 63 Ind. 129..		Bowen v. Swander, 121 Ind.	
.....	143, 552	164	159
Bidinger v. Bishop, 76 Ind.		Boxley v. Collins, 4 Blackf.	
244	281	320	414
Big Four Building and Loan		Boyd v. Boyd, 27 Ind. 429..	
Association v. Olcott, 146		.....	244, 245
Ind. 176.....	606, 607	Boyd v. De La Montagnie, 73	
Biggs v. McCarty, 86 Ind. 352.	53	N. Y. 498.....	158
Billings v. Robinson, 94 N. Y.		Boyer v. Robertson, 144 Ind.	
415	61	604	70
Bingham v. Jordan, 1 Allen		Boyer v. Robertson, 149 Ind.	
373	582	74	394
Bird v. State, 107 Ind. 154..	408	Boyle v. State, 97 Ind. 322..	404
Bishop v. State, 149 Ind. 223		Boyle v. State, 105 Ind. 469..	
.....	288, 290	.....	402, 406, 407
Blissell v. Taylor, 41 Mich.		Bozeman v. Cale, 139 Ind.	
702	162	187	606
Bitting v. Ten Eyck, 82 Ind.		Bradley v. City of Frankfort,	
421	134	99 Ind. 417	186
Blandy v. Benedict, 42 Ohio		Branch v. Foust, 130 Ind. 542.	605
St. 295.....	582	Branham v. Johnson, 62 Ind.	
Blum v. Weston, 102 Cal. 362		259	638
.....	218, 220	Brannen v. Kokomo, etc.,	
Board, etc., v. Allman, 142		Gravel Road Co., 115 Ind.	
Ind. 573.....	66	115	510
Board, etc., v. Bonebrake, 146		Brayton v. City of Fall River,	
Ind. 311	69	113 Mass. 218	672, 676
Board, etc., v. Hall, 70 Ind.		Brazil Block Coal Co. v. Hood-	
469	599	let, 129 Ind. 327.....	290
Board, etc., v. Hill, 115 Ind.		Brickley v. Heilbruner, 7 Ind.	
316	369	488	559
Board, etc., v. Lafayette,		Bridge v. Cage, Cro. Jac. 103.	150
etc., R. R. Co., 50 Ind. 85..	605	Brigham v. Smith, 4 Gray 297.	218
Board, etc., v. McFadden, 88		Brodie v. Watkins, 33 Ark.	
Ind. 333	540	545	635
		Broker v. Scobey, 56 Ind. 588.	369

Brooks v. Harris, 42 Ind. 177. 557	Carlson v. State, 145 Ind. 650. 112
Brookville National Bank v. Kimble, 76 Ind. 195. 450	Carroll v. Wall, 35 Kan. 86. 272
Brown v. Goble, 97 Ind. 86. 556, 559	Carrothers v. Carrothers, 107 Ind. 530. 369
Brown v. Grepe, 135 Ind. 4. 486	Cartright v. Briggs, 41 Ind. 184. 294
Brown v. Lakeman, 12 Cush. 482. 134	Cartwright's Case, 114 Mass. 230. 325
Brown v. Rawlings, 72 Ind. 505. 161	Caskey v. City of Green- burgh, 78 Ind. 233. 176
Brown v. State, 70 Ind. 576. 398, 703, 704	Cauldwell v. Curry, 93 Ind. 363. 599
Brown v. State, 105 Ind. 385. 406, 407	Central Union Tel. Co. v. Fehring, 146 Ind. 189. 378
Brown v. State, 110 Ind. 486. 696	Central Union Tel. Co. v. State, 110 Ind. 203. 259
Brown v. Wright, 4 Yerg. (Tenn.) 57. 463	Chambers v. State, 127 Ind. 365. 234
Bruce v. Cook, 136 Ind. 214. 301, 595	Chandler v. Schoonover, 14 Ind. 324. 552
Bruner v. Brown, 139 Ind. 600. 61	Chandler v. State, 141 Ind. 106. 83, 405
Brutton v. State, 4 Ind. 601. 235	Chaplin v. Baker, 124 Ind. 385. 371
Bucher v. Commonwealth, 103 Pa. St. 528. 571, 572	Chatten v. Snider, 126 Ind. 387. 515
Buck v. Milford, 90 Ind. 291. 578	Chicago, etc., R. W. Co. v. Burger, 124 Ind. 275. 69
Buffum's Case, 18 N. H. 14. 325	Chicago, etc., R. W. Co. v. City of Chicago, 140 Ill. 309. 178
Bumgardner v. Edwards, 85 Ind. 117. 422	Chicago, etc., R. W. Co. v. Derkes, 103 Ind. 520. 157
Bundy, Rec., v. Town of Monticello, 84 Ind. 119. 143, 547, 549, 551	Chicago, etc., R. W. Co. v. Eggers, 147 Ind. 299. 191, 354
Burden v. Burden, 141 Ind. 471. 367, 368	Chicago, etc., R. W. Co. v. Hedges, Admx., 118 Ind. 5. 67
Burk v. Andis, 98 Ind. 59. 438	Chicago, etc., R. W. Co. v. Hunter, 128 Ind. 213. 179
Burke v. State, 52 Ind. 522. 235	Chicago, etc., R. R. Co. v. Thomas, 147 Ind. 35. 526
Burkham v. McElfresh, 88 Ind. 223. 81	Chittock v. Chittock, 101 Mich. 367. 162
Burnham v. Heselton, 82 Me. 495. 637	Church v. Fisher, 40 Ind. 145. 381
Burns v. Singer Mfg. Co., 87 Ind. 541. 156	Cincinnati, etc., R. W. Co. v. City of Anderson, 139 Ind. 490. 176, 178
Buswell v. Supreme Sitting, 161 Mass. 224. 384	Cincinnati, etc., R. R. Co. v. Claire, 6 Ind. App. 390. 278
Butner v. Bowser, 104 Ind. 255. 515	Cincinnati, etc., R. R. Co. v. Clifford, 113 Ind. 460. 180
Cabinet Makers' Union v. City of Indianapolis, 146 Ind. 671. 470	Cincinnati, etc., R. R. Co. v. Cooper, 120 Ind. 469. 500
Campbell v. State, 148 Ind. 527. 50, 633, 709	Citizens State Bank, etc., v. Harris, 149 Ind. 208. 515
Campbell v. Vining, 23 Ill. 473. 243, 245	
Capers v. Wilson, 3 McCord 170. 220	
Carey v. Grant, 59 Barb. (N. Y.) 574. 635	

TABLE OF CASES CITED.

ix

Citizens Street R. R. Co. v. Stoddard, 10 Ind. App. 278..	527	Clause Printing Press Co. v. Chicago, etc., Bank, 145 Ind.	682
Citizens Street R. R. Co. v. Sutton, 148 Ind. 169.....	265, 633	709	191, 283
City of Alexandria v. Cutler, 139 Ind. 568.....	265	Clem v. State, 33 Ind. 423....	197, 201
City of Bedford v. Neal, 143 Ind. 425.....	72	Clouser v. Ruckman, 104 Ind. 588.....	680
City of Decatur v. Grand Rapids, etc., R. R. Co., 146 Ind. 577.....	112	Cluggish v. Koons, 15 Ind. App. 599.....	120
City of Delphi v. Startzman, 104 Ind. 343.....	259	Coad v. Coad, 41 Wis. 26.....	604
City of Elkhart v. Simonton, 71 Ind. 7.....	182	Coates v. Woodworth, 13 Ill. 654.....	463
City of Elkhart v. Wickwire, 121 Ind. 331.....	520	Coats v. Gordon, 144 Ind. 19..	19
City of Evansville v. Decker, 84 Ind. 325.....	672	Cochran v. Ripy, 13 Bush (Ky.) 495.....	575
City of Evansville v. Pfisterer, 34 Ind. 36.....	120	Coe v. Smith, 4 Ind. 79.....	638
City of Fort Wayne v. Lake Shore, etc., R. W. Co., 132 Ind. 558.....	178	Coffin v. Ransdell, 110 Ind. 417.....	61
City of Huntington v. Breen, 77 Ind. 29.....	73	Cole v. Lafontaine, 84 Ind. 446.....	371
City of Indianapolis v. Bieler, 138 Ind. 30.....	207	Colee v. State, 75 Ind. 511....	406
City of Indianapolis v. Kingsbury, 101 Ind. 200....	281, 282	Coleman v. Coleman, 78 Ind. 344.....	61
City of Lafayette v. Fowler, 34 Ind. 140.....	120	Collins v. Cornwell, 131 Ind. 20.....	369
City of Logansport v. Uhl, 99 Ind. 531.....	120, 121	Collins v. Prentice, 15 Conn. 39.....	219
City of Madison v. Smith, 83 Ind. 502.....	516	Combs v. Union Trust Co., 146 Ind. 688.....	390
City of North Vernon v. Voegler, 103 Ind. 314.....	683	Commonwealth v. Baldwin, 1 Watts 54.....	294
City of Plymouth v. Milner, 117 Ind. 324.....	72	Commonwealth v. Baxter, 35 Pa. St. 263.....	318
City of Richmond v. Test, 18 Ind. App. 482.....	671	Commonwealth v. Brown, 167 Mass. 144.....	622
City of Seymour v. Cummins, Admx., 119 Ind. 148.....	369	Commonwealth v. Charles-town, 1 Pick. 180.....	674
City of Seymour v. Jeffersonville, etc., R. R. Co., 126 Ind. 466.....	176	Commonwealth v. Densmore, 94 Mass. 535.....	404
City of South Bend v. Hardy, 98 Ind. 577.....	73	Commonwealth v. Sanders, (Mass.) 14 Gray 394.....	404
City of South Bend v. Paxon, 67 Ind. 228.....	348	Cones v. Board, etc., 137 Ind. 404.....	67
City of Terre Haute v. Hudson, 112 Ind. 542.....	672	Conger v. Miller, 104 Ind. 592..	163
Clark v. Ellis, 2 Blackf. 8....	207	Conlin's Case, 148 Mass. 168..	622
		Connecticut Mutual, etc., Co. v. Athon, 78 Ind. 10.....	420
		Conner v. Citizens' Street R. W. Co., 105 Ind. 62.....	69
		Conner v. Citizens' Street R. R. Co., 146 Ind. 430....	499, 500
		Conrad v. Fisher, 37 Mo. App. 352.....	576
		Cook v. Walling, 117 Ind. 9....	371
		Cooke v. State, 83 Ind. 402..	343

Cooper v. Perdue, 114 Ind. 207	582	Deal v. State, 140 Ind. 354..	412, 689, 691, 710
Cooper v. State, 120 Ind. 377	406, 407	Dean v. Wilkerson, 126 Ind. 340	374
Copeland v. Summers, 138 Ind. 219	481	De Hart v. Board, etc., 143 Ind. 363	112
Coppage v. Gregg, 1 Ind. App. 112	212	Dellks v. State, 141 Ind. 23..	406, 409, 412
Cottrell v. Cottrell, 126 Ind. 181	133	Denney v. State, 144 Ind. 503.258	
Coutts v. Acworth, L. R. 8. Eq. 558	433	Denton v. Thompson, 136 Ind. 446	94
Craig v. Frazier, 127 Ind. 286.406		Derry v. Derry, 98 Ind. 319..	441, 442
Craighead v. Dalton, 105 Ind. 72	394	De Turk v. Commonwealth, 129 Pa. St. 151.....	233
Creighton v. Piper, 14 Ind. 182	232	Dice v. Morris, 32 Ind. 283...605	
Crisfield v. State, 55 Md. 192.465		Dickerson v. Bradford, 59 Ala. 581	637
Crisman v. Leonard, 126 Ind. 202	19	Dickson v. People, 17 Ill. 191.232	
Crofut v. Brandt, 58 N. Y. 106	150	Dillinger's Appeal, 35 Pa. St. 357	162
Crowell v. Lambert, 10 Minn. 369	318	Dillman v. Dillman, 90 Ind. 585	440, 442
Cummins v. City of Seymour, 79 Ind. 491.....	672	Dodge v. Kinzy, 101 Ind. 102.359	
Cummins, Tr., v. Evansville, etc., R. R. Co., 115 Ind. 417..278		Dodge v. State, 140 Ind. 284..325	
Cunningham v. Gwinn, 4 Blackf. 341.....	157	Dorsey Machine Co. v. Mc- Caffrey, 139 Ind. 545.....	245
Cupp v. Campbell, 103 Ind. 213	19	Douglass v. Howland, 11 Ind. 554	63
Dakin v. Dakin, 97 Mich. 284.162		Dowell v. Lahr, 97 Ind. 146..394	
Danenhoffer v. State, 79 Ind. 75	305	Dowell v. Talbot Paving Co., 138 Ind. 675	192
Darkles v. Bellows, 94 Ind. 64	486	Drake v. State, 145 Ind. 210..559	
Darlington's Appeal, 86 Pa. St. 512	158	Draper v. Morris, 137 Ind. 169	367
Daubenspeck, Admr., v. Biggs, Admr., 71 Ind. 255.....	169	Dudley v. Pigg, 149 Ind. 363..304	
Davenport v. Mayor, 67 N. Y. 456	232	Duke v. Harper, 8 Mo. App. 296	635
Davidson v. Coon, 125 Ind. 497	43	Duke of Leeds v. Earl of Am- herst, 2 Phil. Ch. 117.....	121
Davie v. Stevens, 1 Doug. 321. 53		Dumbould v. Rowley, 113 Ind. 357	212
Davis v. Coburn, 128 Mass. 377	463	Dunn v. Tousey, 80 Ind. 288..360	
Davis v. Davis, 119 Ind. 511.145		Durkee v. Gum, 41 Kan. 496..635	
Davis v. Davis, 141 Ind. 367.468		Durland v. Pitcairn, 51 Ind. 426	156
Davis v. Davis, 145 Ind. 4..523		Durward v. Jewett, 46 La. Ann. 559	384
Davis v. Krug, 95 Ind. 1.440, 442		Dutton v. Dutton, 30 Ind. 452	161, 163
Davis v. Ladoga Creamery Co., 128 Ind. 222.....	61	Duvall v. Craig, 2 Wheat. (U. S.) 45	463
		Dyer v. Waters, 46 N. J. Eq. 484	465

TABLE OF CASES CITED

xi

Earl v. Matheney, 60 Ind. 202.	557	Ex parte Ford, 74 Ind. 415.	185
El River, etc., Ass'n v. Topp,		Ex parte Heath, 3 Hill 42.	318
16 Ind. 242.	414	Ex parte Wilson, L. R. 7 Ch.	
Egbert v. Lake Shore, etc., R.		App. 490.	390
W. Co., 6 Ind. App. 350.	278		
Eggleston v. Castle, 42 Ind.		Fairbanks v. Meyers, 98 Ind.	
531.	406	92.	157
Eley v. Miller, 7 Ind. App.		Fall v. Hazelrigg, 45 Ind. 578.	186
529.	151	Farmer v. National Life As-	
Ellis v. Bassett, 128 Ind. 118		sociation, 138 N. Y. 285.	604
.....217, 218, 220		Farmers Loan, etc., Co. v.	
Elmore v. Johnson, 148 Ill.		Minneapolis, etc., Engine	
513.	637, 638	Works, 35 Minn. 343.	584
Elston v. Piggott, 94 Ind. 14.		Farmers Loan and Trust Co.	
.....477, 484		v. San Diego St. Car Co., 45	
Emerson v. Cochran, 111 Pa.		Fed. 518.	583
St. 619.	134	Farrar v. Clark, 97 Ind. 447.	89
Emery v. Royal, 117 Ind. 290.	512	Farris v. Jones, 112 Ind. 498.	440
Enfield, etc., Co. v. Hartford,		Farwell v. Johnston, 34 Mich.	
etc., R. R. Co., 17 Conn. 454.	180	342.	162
Englar v. Offutt, 70 Md. 78.	143	Faught v. Faught, 98 Ind. 470	
Epps v. State, 102 Ind. 539.		.....35, 477	
.....406, 702		Faust v. City of Huntington,	
Erwin v. Fulk, 94 Ind. 235.	259	91 Ind. 493.	281, 282
Evansville, etc., R. R. Co. v.		Fawcett v. Supreme Sittig,	
Carvener, 113 Ind. 51.	278	64 Conn. 170.	384
Evansville, etc., R. R. Co. v.		Fellenzer v. Van Valzah, 95	
Dick, 9 Ind. 433.	348	Ind. 128.	369
Evansville, etc., R. R. Co. v.		Ferguson v. Northern Bank,	
Duel, 134 Ind. 158.	262	14 Bush. (Ky.) 555.	575
Evansville, etc., R. R. Co. v.		Ferris v. Reed, 87 Ind. 123.	481
Swift, 128 Ind. 34.	179	Finch v. Jackson, 30 Ind. 387.	422
Evansville, etc., R. R. Co. v.		Finley v. Cathcart, 149 Ind.	
Taft, 2 Ind. App. 237.	135	470.	35, 532
Evansville, etc., R. R. Co. v.		First Nat'l Bank v. Dovetail,	
Tohill, Admx., 143 Ind. 49.	262	etc., Co., 143 Ind. 534.	583
Everitt v. Everitt, L. R. 10		First Nat'l Bank v. Dovetail,	
Eq. 405.	433	etc., Co., 143 Ind. 550.	583
Everroad v. Schwartzkopf,		First Nat'l Bank v. Williams,	
123 Ind. 38.	638	126 Ind. 423.	578
Eversmann, Rec., v. Schmitt,		Fischli v. Fischli, 1 Blackf.	
53 Ohio St. 174.	14	360.	477
Ewing v. Bass, 149 Ind. 1.	431	Fiscus v. Fiscus, 127 Ind. 283	
Ewing v. Jones, 130 Ind. 247		.....590, 591	
.....2, 9, 431		Fiscus v. Moore, 121 Ind. 547.	590
Ewing v. Lutz, 131 Ind. 361.	2	Fishback v. Van Dusen, 33	
Ewing v. Patterson, 35 Ind.		Minn. 111.	571
330.	605	Fisher v. Louisville, etc., R. W.	
Ewing v. Thompson, 43 Pa.		Co., 146 Ind. 558.	135, 499
St. 372.	318	Fisher v. Purdue, 48 Ind. 323.	553
Ewing v. Wilson, 132 Ind. 223		Fisher, Admr., v. Louisville,	
.....2, 7, 8, 9, 431		etc., R. W. Co., 146 Ind. 558.	70
Exchange Bank v. Ault, 102		Fletcher v. Crist, 139 Ind. 121	
Ind. 322.	77	.....398, 704	
Ex parte Banco De Portugal,		Fletcher v. Sharp, 108 Ind.	
L. R. 11 Ch. Div. 317.	390	276.	547

Flickinger v. Wagner, 46 Md. 580	134	Glenn v. Clark, 53 Md. 580..	162
Foltz v. Kerlin, 105 Ind. 221	226, 232, 233	Goff v. Rogers, 71 Ind. 459..	161
Forder v. Davis, 38 Mo. 107	480, 488	Goodwin v. State, 96 Ind. 550.	406
Fosher v. Guilliams, 120 Ind. 172	367	Goodwine v. Crane, 41 Ind. 335	148
Foster v. Ward, 75 Ind. 594..	50	Gordon v. Stockdale, 89 Ind. 240	134
Fowler v. Duhme, 143 Ind. 248.....	56, 57	Gosman v. State, 106 Ind. 203	231, 233, 288
Franklin Wharf Co. v. City of Portland, 67 Me. 46.....	672	Graham Button Co. v. Spiel- man, 50 N. J. Eq. 120.	583, 584
French v. State, ex rel., 141 Ind. 618	184, 186	Grand Rapids, etc., R. R. Co. v. Horn, 41 Ind. 479.....	179
Friddle v. Crane, 68 Ind. 583.	414	Granger v. Adams, 90 Ind. 87.	582
Friedline v. State, 93 Ind. 366.	558	Granger v. Granger, 147 Ind. 95	55
Frisbie v. Fogg, 78 Ind. 269..	313	Grant v. Deuel, 3 Rob. (La.) 17	134
Fugate v. Payne, 130 Ind. 281.	423	Grass v. Hess, 37 Ind. 193.	559
Fulp v. Beaver, 136 Ind. 319.	450	Greensburgh, etc., Turnpike Co. v. Sidener, 40 Ind. 424..	369
Funk v. Rentchler, 134 Ind. 68	305	Greenwood v. Freight Co., 15 Otto 13	180
Galbreath v. McNelly, 40 Ind. 231	381	Griffin v. Chubb, 7 Tex. 603..	134
Galentine v. Wood, 137 Ind. 532	459	Griffis v. Sellars, 2 Dev. & B. (N. C.) 492.....	134
Gallaher v. State, 101 Ind. 411	406	Griffin v. Wallace, 66 Ind. 410	478
Galloway v. Stewart, 49 Ind. 156	133	Grinnell v. Merchants Ins. Co., 16 N. J. Eq. 283.....	388
Galvin v. State, 93 Ind. 550..	702	Green v. Brown, 146 Ind. 1...	477
Garber v. State, 94 Ind. 219..	406	Green v. Elliott, 86 Ind. 53..	457
Gardner v. Fisher, 87 Ind. 376	605	Greenwood v. State, 116 Ind. 485	643
Garn v. Garn, 135 Ind. 687..	367, 368	Gruhl v. Gruhl, 123 Ind. 86..	467, 468
Garnsey v. Mundy, 24 N. J. Eq. 243	433	Guetig v. State, 66 Ind. 64..	399
Garrett v. State, ex rel., 149. Ind. 264	264	Guilr v. Gillett, 124 Ind. 501..	593
Garver v. Miller, 16 Ohio St. 527	159, 162	Gullick v. Connely, 42 Ind. 134	192
Gellfuss v. Corrigan, 95 Wis. 651	571, 576, 581	Gum-Elastic Roofing Co. v. Mexico Publishing Co., 140 Ind. 158.....	364, 557
George v. People, 167 Ill. 447	618, 619, 621	Habig v. Dodge, 127 Ind. 31.	477
Gerrish v. Brown, 51 Me. 256.	674	Hadley v. Gutridge, 58 Ind. 302	603
Gilbert v. McCorkle, 110 Ind. 215	308	Hadley v. Mayor, 33 N. Y. 603	318
Gilbert v. Welsch, 75 Ind. 557.	459	Hagaman v. Moore, 84 Ind. 496	457
Gillford v. Windel, 108 Pa. St. 142	134	Hagerman v. Ohio Building and Savings Association, 25 Ohio St. 186.....	15
Glass v. Davis, 118 Ind. 593..	157, 158		

TABLE OF CASES CITED.

xiii

Haldeman v. Haldeman, 40 Pa. St. 29.....	54	Henderson v. Henderson, 110 Ind. 316	470
Hall v. Fisher, 20 Barb. (N. Y.) 441	134	Henderson v. Indiana Trust Co., 143 Ind. 561	588
Hall v. State, 8 Ind. 439..	406, 407	Henderson v. State, 60 Ind. 296	235
Halstead v. Westervelt, 41 N. J. Eq. 100	44	Henderson v. State, ex rel., 137 Ind. 552.....	119
Hamrick v. Loring, 147 Ind. 229	112	Hendrickson v. Walker, 32 Mich. 68	135
Hanes v. Tiffany, 25 Ohio St. 549	582, 583	Hescott's Case, 1 Salk. 330....	150
Hannan v. Osborn, 4 Paige 336	53	Hetrick v. Hetrick, 13 Ind. 44	158
Harley v. Louisville, etc., R. W. Co., 57 Fed. 144.....	172	Heyl v. State, 109 Ind. 593....	702
Harness v. State, 143 Ind. 420	193	Higgins v. Scott, 2 Barn. & Adol. 413	592
Harrell v. Harrell, 117 Ind. 94	161	Hilbish v. Hattle, 145 Ind. 59.163	
Harris v. Carpenter, 109 Ind. 540	56	Hill v. Allen, 2 M. & W. 234..	639
Harrison Nat'l Bank v. Culbertson, 147 Ind. 611.....	459	Hill v. Featherston, 7 Bing. 569	639
Harshman v. Armstrong, 43 Ind. 128	98	Hill v. Josselyn, 13 S. & M. (Miss.) 597	294
Harter v. Eltzroth, 111 Ind. 159	39	Hill v. Roach, 72 Ind. 57.....	523
Harvey v. Myer, 9 Ind. 391..	115	Hillenberg v. Bennett, 88 Ind. 540	459
Haskell v. City of New Bedford, 108 Mass. 208	673, 678	Hinchcliffe v. Koontz, 121 Ind. 422	402
Haskett v. Maxey, 134 Ind. 182	419	Hines v. Driver, 100 Ind. 315. 14	
Hasseld v. Seyfort, 105 Ind. 534	583	Hire v. State, 144 Ind. 359....	412
Hatfield v. Cummings, Rec., 142 Ind. 350.....	63	Hobbs v. State, 133 Ind. 404..	617
Hauk v. State, 148 Ind. 238..	404	Hoffman v. Henderson, 145 Ind. 613	445
Havens v. Church, 104 Mich. 135	465	Hoglan v. Carpenter, 4 Bush. (Ky.) 89.....	232
Hawkins v. State, 126 Ind. 294	325	Holland v. Holland, 131 Ind. 196	369
Hawley v. Bennett, 4 Paige Ch. 168	325	Holler v. State, 37 Ind. 57....	404
Hays v. Cecil, 16 Lea (Tenn.) 160	390	Holloran v. Midland R. W. Co., 129 Ind. 274.....	98, 252
Haywood v. Ensley, 8 Hump. (Tenn.) 460	463	Hollowell v. Simonson, 21 Ind. 398	161
Hellman v. Hellman, 129 Ind. 59	56	Holmes v. Seely, 19 Wend. 507	220, 221
Heitman v. Schnek, 40 Ind. 93	364	Hoover v. Weesner, 147 Ind. 510.....	265, 709
Heldt v. Webster, 60 Tex. 207	134	Hopkins v. Greensburg, etc., Turnpike Co., 46 Ind. 187..	689
Hellenkamp v. City of Lafayette, 30 Ind. 192.....	120	Hopman v. Barber, 2 Strange *814	150
		Hopper v. Lovejoy, 47 N. J. Eq. 573	584
		Horlacker v. Brafford, 141 Ind. 528	421
		Houghton v. Houghton, 14 Ind. 505	159

Hovenden v. Lord Annesley, 2 Sch. & Lef. 630.....	465	Ingerman v. Noblesville Township, 90 Ind. 393.....	207
Hovey, Governor, v. State, ex rel., 119 Ind. 386.....	186	In re Bugbee, 9 Nat'l Bank Reg. 258.....	390
Howard v. Shoemaker, 35 Ind. 111	231	In re Corliss, 11 R. I. 638....	232
Howe v. State, 10 Ind. 423....	235	In re Fenton's Will, 97 Ia. 192	39
Howton v. Frearson, 8 T. R. 50	218	In re Guerrero, 69 Cal. 88....	183
Huffman v. Copeland, 139 Ind. 221.....	159, 160, 162	In re Hallett's Estate and Knatchbull v. Hallett, L. R. 13 Ch. Div. 696.....	143
Huffmond v. Bence, Admr., 128 Ind. 131.....	44	In re Johnson, 12 Kansas 102..	181
Hughes v. Parker, 148 Ind. 692	520	In re Spencer, 96 Cal. 448....	40
Hughes v. People, 5 Colo. 436..	325	Ireland v. Montgomery, 34 Ind. 174	156
Hume v. Conduitt, 76 Ind. 598	558, 559	Irey v. Mater, 134 Ind. 238....	421
Hunter v. Chandler, 45 Mo. 452	318	Irvin v. Buckles, 148 Ind. 389..	486
Hunter v. State, 101 Ind. 241..	408	Isbell v. Stewart, 125 Ind. 112	477, 485
Huntington v. McMahon, 48 Conn. 174	325	Isgrigg v. Pauley, 148 Ind. 436.....	212, 213, 415
Hutts v. Martin, 131 Ind. 1..	103, 252	Ivens v. Cincinnati, etc., R. W. Co., 103 Ind. 27.....	510
Hyatt v. Clements, 65 Ind. 12	689	Jackson v. Buchanan, 59 Ind. 390	243, 247
Illinois, etc., Canal Co. v. Chicago, etc., R. R. Co., 14 Ill. 314	180	Jackson v. Landers, 134 Ind. 529	461
Illinois, etc., R. R. Co. v. City of Chicago, 138 Ill. 453.....	178	Jackson v. State, 103 Ind. 250	599
Illinois, etc., R. R. Co. v. City of Chicago, 141 Ill. 586....	178	Jeffs v. Wood, 2 P. Williams 128	592
Illinois, etc., R. R. Co. v. City of Chicago, 156 Ill. 98.....	178	Jenne v. Marble, 37 Mich. 319..	158
Indiana, etc., R. W. Co. v. Allen, 100 Ind. 409.....	179	Johnson v. Breedlove, 72 Ind. 368	414
Indiana, etc., R. W. Co. v. Brittingham, 98 Ind. 294....	436	Johnson v. Culver, 116 Ind. 278	190
Indiana, etc., R. W. Co. v. Hammock, 113 Ind. 1.....	67	Johnson v. Holliday, 79 Ind. 151	50
Indianapolis, etc., Mfg. Co. v. First Nat'l Bank, 33 Ind. 302	689	Johnson v. Jones, 79 Ind. 141..	305
Indianapolis, etc., R. W. Co. v. Bush, 101 Ind. 582.....	69	Johnson v. Miller, 43 Ind. 29..	102
Indianapolis, etc., R. W. Co. v. Harmless, 124 Ind. 25....	558	Johnson v. Moore, 112 Ind. 91	364
Indianapolis, etc., R. R. Co. v. McClaren, 62 Ind. 566.....	504	Johnson v. Ramsay, 91 Ind. 194	559
Indianapolis, etc., R. R. Co. v. State, ex rel., 37 Ind. 489..	278	Johnson v. Rockwell, 12 Ind. 76	158
		Johnson v. State, 11 Ind. 481..	343
		Johnson v. State, 75 Ind. 553..	343
		Johnson v. Stevenson, 104 Ind. 368	98
		Jones v. Castor, 96 Ind. 307....	305
		Jones v. Gupton, 65 N. C. 48....	150
		Jones v. Jones, 108 N. Y. 415..	603
		Jones v. State, 50 Ind. 473....	343

TABLE OF CASES CITED.

xv

Jones v. Vert, 121 Ind. 140..	Lafayette Plankroad Co. v.
.....478, 486, 549	New Albany, etc., R. R. Co.,
Jordan v. Jordan, 2 L. Re-	13 Ind. 90 .....180
pos. (N. C.) 292.....463	Lake Erie, etc., R. W. Co. v.
Josselyn v. Stone, 28 Miss.	Acres, 108 Ind. 548.....354
753 .....294	Lake Erie, etc., R. R. Co. v.
Judah v. Trustees of Vin-	Cluggish, 143 Ind. 347.....278
cennes University, 16 Ind.	Lake Erie, etc., R. R. Co. v.
56 .....665	Smith, 61 Fed. 885 .....347
Judah v. Trustees of Vin-	Lake Erie, etc., R. R. Co. v.
cennes University, 23 Ind.	State, ex rel., 139 Ind. 158..279
272 .....637	Lake Erie, etc., R. R. Co. v.
Jullan v. Beal, 26 Ind. 220...213	Stick, 143 Ind. 449..67, 412, 508
Junker v. Hustes, 113 Ind.	Lake Erie, etc., R. R. Co. v.
524 .....515	Town of Boswell, 137 Ind.
	336 .....281
Kean v. Supreme Sitting, 3	Lake Erie, etc., R. W. Co. v.
Pa. Dist. Rep. 323.....384	Young, 135 Ind. 426....92, 349
Keepfer v. Force, 86 Ind. 81..436	Lake Shore, etc., R. W. Co. v.
Keesling v. Winfield, 149 Ind.	McIntosh, 140 Ind. 261.278, 347
709 .....375	Lake Shore, etc., R. R. Co. v.
Keller v. State, 51 Ind. 111..340	Miller, 25 Mich. 274.....506
Kelley v. McFadden, 80 Ind.	Lamb v. Morris, 118 Ind. 179
536 .....515	.....547, 549
Kempner v. Churchill, 8 Wall.	Langsdale v. Woollen, 99 Ind.
362 .....451	575 .....461
Kennedy v. Shaw, 38 Ind. 474.582	Lankford v. State, 144 Ind.
Kennedy v. State, 107 Ind.	428 .....412
144 .....406	Lantz v. Maffett, 102 Ind. 23.394
Kennedy v. Warnica, 136 Ind.	Lash v. Rendell, 72 Ind. 475.371
161 .....243	Launtz v. People, 113 Ill. 137.272
Kerr v. Trego, 47 Pa. St. 292.318	Laverty v. State, ex rel., 109
Kersey v. Garton, 77 Mo. 645.635	Ind. 217 .....369
Kessler v. State, ex rel., 146	Lawrenceburg Furniture Mfg.
Ind. 221.....254	Co. v. Hinke, 119 Ind. 47.....191
Killbourne v. Fay, 29 Ohio St.	Leary v. Langsdale, 35 Ind.
264 .....583	74 .....414
Kimball v. Cochecho Railroad,	Lease v. Carr, 5 Blackf. 353.487
27 N. H. 448.....217	LeCatt v. Sallee, 3 Porter
Kimble v. Seal, 92 Ind. 276..440	(Ala.) 115.....637, 638
King v. Easton, 135 Ind. 353.212	Ledford v. Ledford, 95 Ind.
King v. Rea, 56 Ind. 1.....53	283 .....402
Kitts v. Willson, 140 Ind. 604	Ledgerwood v. State, 134 Ind.
.....453, 484, 549	81 .....413, 613, 706
Klingensmith v. Faulkner, 84	Lee v. Mozingo, 143 Ind. 667.252
Ind. 331 .....369	Legler v. Paine, 147 Ind. 181..
Koons v. Mellet, 121 Ind.	.....151, 152, 166
137 .....709	Lemster v. Warner, 137 Ind.
Koons v. Mellett, 121 Ind.	79 .....243
585 .....590	Lenninger v. Wenrick, 98 Ind.
Krette v. Smith, 3 Ind. App.	596 .....414
64 .....557	Leverich v. State, 105 Ind.
Lacy v. Mitchell, 23 Ind. 67..183	277 .....83, 404
	Lewis v. Lewelling, 53 Kan.
	201 .....202, 206

Liggett v. Hinkley, 120 Ind. 387	118	Makepeace v. Bronnenberg, 146 Ind. 243.....	593
Liggett v. Lozier, 133 Ind. 451	414	Manchester v. Dodge, 57 Ind. 584	553
Lilly v. Somerville, 142 Ind. 298	252	Manning v. Gasharle, 27 Ind. 399	39
Lime City Building, etc., As- sociation v. Black, 136 Ind. 544	80	Marbury v. Madison, 1 Cranch. 137.....	318
Lindley v. Kregelo, 121 Ind. 176	63	Marks v. Townsend, 97 N. Y. 590	184
Lipes v. Hand, 104 Ind. 503. 92		Marquis v. Davis, 113 Ind. 219	394
Littell v. State, 133 Ind. 577. 340		Martin v. Martin, 74 Ind. 207	305
Livingston v. Livingston, 2 John. Ch. 537.....	162	Martindale v. Alexander, 26 Ind. 104	481
Livingston v. State, 141 Ind. 131	412	Marvin v. Sager, 145 Ind. 261. 168	
Locke v. Catlett, 96 Ind. 291. 436		Maryland, etc., R. R. Co. v. Neubeur, 62 Md. 391.....	507
Lockwood v. Slevin, 26 Ind. 124	582, 583	Mason v. Roll, Exr., 130 Ind. 260	34
Logan v. Stogsedale, 123 Ind. 372	217	Masters v. Beckett, 83 Ind. 595	163, 605
Long v. Crosson, 119 Ind. 3. 359		Mattix, Admx., v. Leach, 16 Ind. App. 112.....	146
Loomis v. Farnum, 14 N. H. 119	390	May v. City of Detroit, 28 Mich. 263.....	601
Louisville, etc., R. W. Co. v. Ader, 110 Ind. 376.....	499	May v. State Bank, 9 Ind. 233	414
Louisville, etc., R. W. Co. v. Bryan, 107 Ind. 51.....	499, 510	McAllister v. Henderson, 134 Ind. 453	92
Louisville, etc., R. W. Co. v. Falvey, 104 Ind. 409.....	401	McCarthy v. McCarthy, 66 Ind. 128	487
Louisville, etc., R. W. Co. v. Green, 120 Ind. 367.....	190	McClure v. Secrist, 5 Ind. 31. 638	
Louisville, etc., R. W. Co. v. Lucas, 119 Ind. 583.....	135	McCormick v. Malin, 5 Blackf. 509	637
Louisville, etc., R. W. Co. v. Lynch, 147 Ind. 165.....	69	McCormick, etc., Co. v. Sco- vell, 111 Ind. 551.....	361
Louisville, etc., R. W. Co. v. Schmidt, 106 Ind. 73.....	510	McCoy v. Able, 131 Ind. 417	120, 148
Louisville, etc., R. R. Co. v. Smith, 91 Ind. 119.....	278	McCoy v. Barns, 136 Ind. 378. 19	
Louisville, etc., R. W. Co. v. Stommel, 126 Ind. 35.....	67	McCulley v. State, 62 Ind. 428	413, 613, 706
Lucas v. Marine, 40 Ind. 239. 683		McCulloch v. State, 11 Ind. 424	665
Lyon v. Davis, 111 Ind. 384. 191		McCullough v. Rice, 59 Ind. 580	133
Lytton v. Baird, 95 Ind. 349. 406		McDermott v. State, 89 Ind. 187	406
Macomber v. Godfrey, 108 Mass. 219	351	McDonald v. Gelsendorf, 128 Ind. 153	369
Macy v. City of Indianapolis, 17 Ind. 267.....	672	McElhinney v. Kline, 6 Mo. App. 94	635
Mahoney v. Robins, 49 Ind. 146	381	McEneney v. Town of Sulli- van, 125 Ind. 407.....	599
Major v. McLester, 4 Ind. 591	638		

TABLE OF CASES CITED.

xvii

McFadden v. Ross, 108 Ind. 512	478	Morris v. State, 96 Ind. 597...	313
Moses v. State, 88 Ala. 78....	403	Moss v. Jenkins, 146 Ind. 589.	212
McGee v. State, 103 Ind. 444	291, 314	Moyer v. Cantieny, 41 Minn. 242	635
McLain v. Wallace, 103 Ind. 562	546	Muncey v. Joest, 74 Ind. 409.	120
McLaughlin v. State, 45 Ind. 338	613, 706	Murphy v. Beard, 138 Ind. 560	180
McNutt v. McNutt, 116 Ind. 545	159	Murphy v. State, 97 Ind. 579..	413, 705
McPheeters v. Wright, 110 Ind. 519.....	436	Murray v. Williamson, 79 Ind. 287	707
Mechanics' Trust Co. v. Dan- dridge (Ky.), 37 S. W. 288	573, 576	Musgrave v. State, 133 Ind. 297	531
Meier v. State, 57 Ind. 386.	235	Musselman v. Manly, 42 Ind. 462	441, 442
Meredith v. State, 122 Ind. 514	83	Nash v. Taylor, 83 Ind. 347..	43
Merritt v. Cobb, 17 Ind. 314.	369	National Bank v. Insurance Co., 104 U. S. 54.....	143, 551
Michael v. Thomas, 24 Ind. 72	558	National Exchange Bank of Hartford v. Wilder, 34 Minn. 149.....	571, 576
Miller v. Noble, 86 Ind. 527..	477, 485	Nat'l State Bank v. Vigo County Nat'l Bank, 141 Ind. 352	584
Miller v. State, 38 Ala. 600...	294, 295	Nave v. Flack, 90 Ind. 205..	73
Miller v. State, 144 Ind. 401.	575	Naylor v. Sidener, 106 Ind. 179	80
Miller v. State, 149 Ind. 607..	647, 708	Newburyport Turnpike v. Eastern Railroad, 23 Pick. 326	674
Miller v. Terre Haute, etc., R. W. Co., 144 Ind. 323	529	Newcastle, etc., R. R. Co. v. Peru, etc., R. R. Co., 3 Ind. 464	180
Milligan v. Poole, 35 Ind. 64.	481	Newcomer v. Hutchings, 96 Ind. 119	369
Milner v. New Jersey R. R. Co., 6 Am. Law Reg. 6....	180	Newell v. Downs, 8 Blackf. 523	133
Minor v. Lumpkin (Texas), 29 S. W. 799.....	39	New England, etc., Co. v. Gay, 33 Fed. 636.....	463
Mitchell v. Allison, 29 Ind. 43	406	New Pittsburg, etc., Coke Co. v. Peterson, 14 Ind. App. 634	261
Mitchell v. Bain, 142 Ind. 604.	351	New Pittsburg, etc., Coke Co. v. Peterson, 136 Ind. 398..	25, 261
Mode v. Beasley, 143 Ind. 306.	411	Newport v. State, 140 Ind. 299	406
Moody v. Fleming, 4 Ga. 115	294, 295	New York, etc., R. R. Co. v. Hamlet Hay Co., 149 Ind. 344	531
Mooney v. York Iron Co., 82 Mich. 263.....	639	Nichols v. Luce, 24 Pick. 102.	217, 221
Moore v. Auge, 125 Ind. 562.	457	Nichols v. State, 127 Ind. 406.	77
Moore v. Lynn, 79 Ind. 299..	39		
Moore v. Township of Kenoc- kee, 75 Mich. 332.....	48		
Moores v. Hare, 144 Ind. 573	53, 56		
More v. Freeman, Bunb. 205.	162		
Morey v. Ball, 90 Ind. 450.	442		
Morris v. Edgington, 3 Taunt. 23	221		

Nightingale v. Burrell, 15 Pick. 104	53	Pennsylvania Co. v. Meyers, Admx., 136 Ind. 242....	67, 504
Nixon v. Whitely, etc., Co., 130 Ind. 360.....	19	Pennsylvania Co. v. Niblack, 99 Ind. 149.....	553
Noble v. Board, etc., 101 Ind. 127	151	Pennsylvania Co. v. Poor, 103 Ind. 553.....	414
Nugent v. Laduke, 87 Ind. 482	552	Pennsylvania Co. v. Sinclair, 62 Ind. 301.....	500
O'Brien v. State, 63 Ind. 242..	235	Pennsylvania Co. v. Smith, 98 Ind. 42.....	510
Ohio, etc., R. W. Co. v. Dunn, 138 Ind. 18.....	262	Pennsylvania Co. v. State, 142 Ind. 428.....	295, 300
Ohio, etc., R. W. Co. v. Hill, Admx., 117 Ind. 56.....	67	Pennsylvania Co. v. Weddle, 100 Ind. 138.....	183
Ohio, etc., R. W. Co. v. Simon, 40 Ind. 278.....	683	People v. Bush, 40 Cal. 344...	183
Ohio, etc., R. W. Co. v. Walker, 113 Ind. 196.....	506	People v. Callaghan, 83 Ill. 128	318
Old v. Mohler, 122 Ind. 594...	414	People v. Common Council, 77 N. Y. 508.....	281
Oliver v. Pate, 43 Ind. 132..	133, 134	People v. Compton, 1 Duer (N. Y.) 512	325
Orb v. Coapstick, 136 Ind. 313.	143	People v. Cummings, 88 Mich. 249	629
Osborne v. State, 128 Ind. 129	233, 288, 314	People v. Gates, 13 Wend. 311	343
Overmyer v. Cannon, 82 Ind. 457	63	People v. Hall, 94 Cal. 595....	404
Owens v. Bank, 31 Md. 325...	162	People v. Head, 25 Ill. 287...	318
Paddock v. Watts, 116 Ind. 146	133	People v. McCrea, 32 Cal. 98.	404
Palmer v. Chicago, etc., R. R. Co., 112 Ind. 250.....	500, 504	People v. McGungill, 41 Cal. 429	400
Palmer v. Foley, 36 N. Y. Super. Ct. 14.....	260	People v. McLaughlin, 44 Cal. 435	404
Palmer v. Stumph, 29 Ind. 329	120	People v. Miller, 16 Mich. 56.	318
Parker v. Pennsylvania Co., 134 Ind. 673.....	500	People v. Perry, 79 Cal. 105..	202, 208
Parkman v. Bowdoin, 1 Sum- ner 359.....	53, 54	People v. Provines, 34 Cal. 520	182
Parks v. Sattertwalte, 132 Ind. 411	461, 462, 463	People v. Remington, 12 N. Y. Supp. 824.....	388
Parmillee v. McNutt, 1 S. & M. (Miss.) 179.....	294	People v. Renfrow, 41 Cal. 37.	400
Pattee v. State, 109 Ind. 545..	343	People v. Reynolds, 16 Cal. 128	400
Patten v. Stewart, 24 Ind. 332	442	People v. Stevens, 5 Hill 616.	318
Peck v. Board, etc., 87 Ind. 221	369	People v. Stone, 9 Wend. 180.	343
Peck v. Sims, 120 Ind. 345...	437	People v. Walsh, 43 Cal. 447.	400
Peebles v. Green, 6 Lea (Tenn.) 471	461	People, ex rel., v. State Re- formatory, 148 Ill. 420.....	616, 618, 619, 622
Pennsylvania Co. v. Congdon, 184 Ind. 226.....	262	People's, etc., Ass'n v. Spears, 115 Ind. 297.....	354
		Pernam v. Wead, 2 Mass. 203	217, 218
		Peters v. Griffee, 108 Ind. 121.	120
		Pfau v. State, 148 Ind. 539..	593, 594, 595

TABLE OF CASES CITED.

xix

Pinnington v. Galland, 9 Exch. 1.....	217	Randall v. State, 132 Ind. 539.	334
Pipes v. Hobbs, 83 Ind. 43.....	475	Randles v. Randles, 63 Ind. 93	372
Pittsburg, etc., R. W. Co. v. Martin, 82 Ind. 476.....	529	Ratliffe v. Trimble, 12 B. Monroe 32.....	451
Pittsburg, etc., R. W. Co. v. Noffsger, 148 Ind. 101.....	281	Rauck v. State, 110 Ind. 384..	408
Pittsburg, etc., R. R. Co. v. Spencer, 98 Ind. 186.....	69	Ray v. Yarnell, 118 Ind. 112..	212
Plank v. Jackson, 128 Ind. 424	145	Raymond v. Simonson, 4 Blackf. 77.....	461, 462, 465
Planters Bank v. Hornberger, 4 Coldw. (Tenn.) 531.....	638	Redmond v. State, 35 Ohio St. 81	343
Planters' Bank v. Sharp, 6 How. (U. S.) 301.....	180	Reed v. Beazley, 1 Blackf. 97	161, 163
Polsley v. Anderson, 7 W. Va. 202	635	Reed v. Higgins, 86 Ind. 143..	303
Porter v. City of Tipton, 141 Ind. 347.....	122	Reed v. Kalfsbeck, 147 Ind. 148	35, 532
Postmaster-General v. Early, 12 Wheat. 135.....	228	Reid v. Houston, 49 Ind. 181..	148
Postmaster-General v. Furber, 4 Mason 333.....	228	Reynolds v. Bowen, 138 Ind. 434	48
Potter v. Sheets, 5 Ind. App. 506	19	Reynolds v. Louisville, etc., R. W. Co., 143 Ind. 579.....	14
Potts v. Hartman, 101 Ind. 359	381	Reynolds v. State, 61 Ind. 392.	291
Poudre v. Tate, 132 Ind. 327..	440	Rhoades v. Davis, 51 Mich. 309	162
Powers v. State, 87 Ind. 144.	688	Rice v. City of Evansville, 108 Ind. 7.....	498, 672
Prezinger v. Harness, 114 Ind. 491.....	120, 121	Richards v. Richards, 17 Ind. 636	159
Prideaux v. Lonsdale, 1 De Gex. J. and S. 433.....	9	Richardson v. City of Boston, 19 How. (U. S.) 263.....	673
Procter v. Cole, 104 Ind. 373..	161	Richardson v. Eagle Machine Works, 78 Ind. 422.....	639
Prosser v. Henderson, 11 Ala. 484	450	Richardson's Exr. v. Green, 133 U. S. 30.....	583
Pruitt v. Farber, 147 Ind. 1..	112	Richmond, etc., R. R. Co. v. Louisa R. R. Co., 13 How. (U. S.) 71	180
Pruitt v. Pruitt, 91 Ind. 595..	428, 430	Richter v. Koster, 45 Ind. 440.	133
Pullen v. McKee, 149 Ind. 709'	710	Rick's Appeal, 105 Pa. St. 528.	9
Quill v. City of Indianapolis, 124 Ind. 292.....	122	Ricks v. Yates, 5 Ind. 117....	638, 639
Quimby v. Blackey, 63 N. H. 77	245	Riehl v. Evansville Foundry Association, 104 Ind. 70....	143, 144
Quint v. Ophir Silver Mining Co., 4 Nev. 304.....	635	Rinn v. Rhodes, 93 Ind. 389..	161
Ragsdale v. Mitchell, 97 Ind. 458	436	Roach v. White, 94 Ind. 510..	160
Raleigh National Bank v. Moore, 94 N. C. 734.....	131	Robb v. State, 144 Ind. 569..	412
Randall v. Randall, 37 Mich. 563	162	Robbins v. Magee, 76 Ind. 381	371
		Roberts v. Ball (Cal.), 38 Pac. 949	40
		Roberts v. Farmers', etc., Bank, 136 Ind. 154.....	450
		Robertson v. Robertson, 25 Ia. 350	162

Robinson v. Dickey, 143 Ind. 205 .....168, 559	Scotten v. Randolph, 96 Ind. 581 .....369
Roca v. Byrne, 145 N. Y. 182..144	Sears v. Shafer, 6 N. Y. 268.. 9
Rogers v. Murdock, 45 Hun. 30 .....592	Security Co. v. Arbuckle, 119 Ind. 69..... 19
Rose v. Rose, 93 Ind. 179....161	Seeger v. Pfeiffer, 35 Ind. 13..133
Ross v. Davis, 97 Ind. 79....457	Selbert v. Milligan, 110 Ind. 106 .....582
Ross v. Menefee, 125 Ind. 432.582	Sellers v. Sellers, 141 Ind. 305.....467, 468. 470
Ross v. Stackhouse, 114 Ind. 200 .....120	Shaffer v. Matthews, 77 Ind. 83 .....159
Ross v. State, 131 Ind. 548..315	Sharp v. Sharp's Administra- tion, 27 Ind. 507.....553
Roszell v. Roszell, 105 Ind. 77.115	Shaw v. Beers, 84 Ind. 528...484
Rowley v. Fair, 104 Ind. 189..546	Shaw v. Parker, 6 Blackf. 345 .....487
Royse v. Bourne, 149 Ind. 187.283	Shaw v. Saum, 9 Ind. 517....406
Royse, Exr., v. Leaming, 72 Ind. 184 .....374	Shearer v. State, 7 Blackf. 99.235
Rudd v. Robinson, 61 Hun. 339 .....584	Shepard, Rec., v. Meridian National Bank, 149 Ind. 20 539
Runner v. Dwiggins, 147 Ind. 238 .....61	Shepard, Tr. v. Meridian Na- tional Bank, 149 Ind. 532.. .....20, 143
Russell v. Jackson, 2 Pick. 574.....218 220	Shepardson v. Cary, 29 Wis. 34 .....571, 572. 581
Sage v. State, 127 Ind. 15.... 48	Sherlock v. Louisville, etc., R. W. Co., 115 Ind. 22.....349
Saint Joseph Hydraulic Co. v. Wilson, 133 Ind. 465.....	Shields v. State, 149 Ind. 395.613
.....575, 580, 581, 582	Shoemaker v. South Bend Spark Arrester Co., 135 Ind. 471 .....77
Salem-Bedford Stone Co. v. Hobbs, 144 Ind. 146.....263	Shotts v. Poe, 47 Md. 513... 53
Sandman v. Seaman, 84 Hun. 337 .....451, 452	Shulties v. Kelsner, 95 Ind. 159 .....707
Santo v. State, 2 Iowa 165...183	Siberry v. State, 133 Ind. 677.....687, 689
Saunders v. Montgomery, 143 Ind. 185 .....190. 283	Siberry v. State, 149 Ind. 684.....398, 613
Scarborough v. Watkins, 9 Mon. (Ky.) 540.....158	Sill v. Thomas, 8 Car. & P. 762 .....639
Scarry v. Bennett, 2 Ind. App. 167 .....582	Simmons v. Lindley, 108 Ind. 297 .....440, 441
Schafer v. Schafer, 93 Ind. 586 .....305	Simpson v. Pearson, 31 Ind. 1.371
Schlitz Brewing Co. v. Comp- ton, 142 Ill. 511.....683	Sims v. City of Frankfort, 79 Ind. 446 .....371
Schlunger v. State, 113 Ind. 295 .....643	Sinsheimer v. Whitely, 111 Cal. 378.....571, 576
Schmidt v. Falley, 148 Ind. 150 .....383	Skaggs v. State, 108 Ind. 53..702
Schmidt v. Quin, 136 Mass. 575 .....218	Skillen v. Skillen, 41 Ind. 122.689
Schmueckle v. Waters, 125 Ind. 265 .....156	Smith v. Blair, 133 Ind. 367..243
School Town of Princeton v. Gebhart, 61 Ind. 187.....369	Smith v. Calloway, 7 Blackf. 86 .....461
Schoonover v. Reed, 66 Ind. 598.. .....133	Smith v. Goodknight, 121 Ind. 312 .....176
Scobey v. Ross, 5 Ind. 445...635	

TABLE OF CASES CITED.

xxi

Smith v. Hollett, 34 Ind. 519.157	State v. De Gress, 53 Tex. 387 .....232
Smith v. Kearney, 2 Barb. Ch. 533.....592	State v. De Lay, 93 Mo. 98.343
Smith v. McClain, 146 Ind. 77 .....207	State v. Dillon, 125 Ind. 65.270, 271
Smith v. Selz, 114 Ind. 229.451, 452	State v. Edwards, 114 Ind. 581 .....274
Smith v. Wabash R. R. Co., 141 Ind. 92.....505	State v. Forsythe, 147 Ind. 466 .....255
Smurr v. State, 105 Ind. 125.643	State v. Freeport, 43 Me. 198.674
Smyles v. Hastings, 22 N. Y. 217 .....218	State v. Gerhardt, 145 Ind. 439 .....197, 207
Snowman v. Harford, 57 Me. 397 .....325	State v. Goff, 15 R. I. 505....231
Snyder v. State, 59 Ind. 105.408	State v. Halter, 149 Ind. 292.595
Sohn & Co. v. Gantner, 134 Ind. 31.....361	State v. Hardman, 16 Ind. App. 357.....48, 301
Sondheim v. Gilbert, 117 Ind. 71 .....145	State v. Harrison, 113 Ind. 434 .....260
Spaulding v. Baldwin, 31 Ind. 376 .....394	State v. Helms, 136 Ind. 122.595
Spaulding v. Crane, 46 Vt. 292 .....131	State v. Hunt, 137 Ind. 537... 83
Speldell v. Henrich, 15 Fed. 753 .....461	State v. Indiana, etc., R. R. Co., 133 Ind. 69.....300
Spencer v. McGonagle, 107 Ind. 410.....436	State v. Johnson, 35 Fla. 539.318
Stancliff v. Palmeto, 18 Ind. 321 .....183	State v. Kilroy, 86 Ind. 118.270
Stanley v. Stanton, 36 Ind. 445 .....244, 245	State v. Locke, 35 Ind. 419...343
Stanton v. State, ex rel. 74 Ind. 503.....369	State v. Maltremme, 14 La. Ann. 830.....404
Staser v. Hogan, 120 Ind. 207.406	State v. Matthews, 37 N. H. 450 .....325
State v. Allen, 21 Ind. 516...288	State v. McAllister, 88 Tex. 284 .....186
State v. Arnold, 144 Ind. 651 .....620, 648	State v. McClelland, 138 Ind. 395 .....593, 594, 595
State v. Barron, 74 Ind. 374.165	State v. Murdock, 86 Ind. 124.643
State v. Board, etc., 124 Ind. 554 .....318	State v. Newton, 59 Ind. 173.207
State v. Board, etc., 136 Ind. 207 .....313	State v. Orvis, 13 Ind. 569...343
State v. Bradley, 68 Mo. 140.343	State v. Osborn, 143 Ind. 671.243
State v. Buckles, 39 Ind. 272.313	State v. Peters, 43 Ohio St. 629 .....622, 629
State v. Buckner, 52 Ind. 278.235	State v. Shay, 101 Ind. 36...291
State v. Bus, 135 Mo. 325....231	State v. Sherwood, 15 Minn. 221 .....318
State v. Buttz, 9 S. C. 156...232	State v. Sullivan, 120 Ind. 197 .....61
State v. Carpenter, 20 Ind. 219 .....235	State v. Swift, 69 Ind. 505...258
State v. City of Portland, 74 Me. 268.....673	State v. Walters, 64 Ind. 226.459
State v. Cleveland, etc., R. W. Co., 137 Ind. 75.....340	State v. Williams, 103 Ind. 235 .....343
State v. Conner, 110 Ind. 469.343	State Board of Agriculture v. Citizens' Street R. W. Co. 47 Ind. 407.....568, 579
	State, ex rel., v. Blend, 121 Ind. 514.....207
	State, ex rel., v. Board, etc., 45 Ind. 501.....278

State, ex rel., v. Board, etc., 90 Ind. 359.....	461	Strickler v. Greer, 95 Ind. 596.....	133
State, ex rel., v. Earl, 133 Ind. 389	81	Strieb v. Cox, 111 Ind. 299....	122
State, ex rel., v. Gorby, 122 Ind. 17	207	Strong v. State, 105 Ind. 1....	702
State, ex rel., v. Helms, 130 Ind. 122.....	301	Stultz v. State, 65 Ind. 492....	258
State, ex rel., v. Hyde, 129 Ind. 296	184	Sturges v. Spofford, 52 Barb. 436	270
State, ex rel., v. Kolsem, 130 Ind. 434.....	184	St. Louis, etc., R. W. Co. v. Robbins, 57 Ark. 377.....	173
State, ex rel., v. Krug, 82 Ind. 58	369	Supreme Sitting, etc., v. Baker, 134 Ind. 298.....	80, 383
State, ex rel., v. Sherman, 90 Ind. 123.....	254	Surber v. State, 99 Ind. 71....	698
State, ex rel., v. Sullivan, 120 Ind. 197	543	Sutton v. Bickwith, 68 Mich. 303	157
Staub v. Benthuyssen, 36 La. Ann. 467.....	184	Swatts v. Bowen, 141 Ind. 322	76, 414
Staudé v. Election Commis- sioners, 61 Cal. 313.....	182	Taber v. Ferguson, 109 Ind. 227	120, 599
Staubill v. Blaine National Bank, 11 Wash. 426.....	576	Taggart, Aud., v. Claypool, 145 Ind. 590.....	206
Steele v. Empsom, 142 Ind. 397	176	Talbott, Admr., v. Barber, 11 Ind. App. 1.....	461
Steeple v. Downing, 60 Ind. 478.....	115, 438	Tate v. Fletcher, 77 Ind. 102..	112
Stengel v. Boyce, 143 Ind. 642	14, 582	Taylor v. Duesterberg, 109 Ind. 165	213
Stephens v. Stephens, 51 Ind. 542	707	Taylor v. Taylor, 63 Pa. St. 481	55
Stevenson v. State, 65 Ind. 409	235	Taylor v. Townsend, 8 Mass. 411	218
Stewart v. Beck, 90 Ind. 458.....	578	Teegarden v. Lewis, 145 Ind. 98	69
Stewart v. Hartman, 46 Ind. 331	217	Telfer v. North R. R. Co., 30 N. J. 188	507
Stewart v. State, 111 Ind. 554	407, 587	Ten Brook v. Maxwell, 5 Ind. App. 353.....	459
Stiffler v. Board, etc., 1 Ind. App. 368	151	Terre Haute, etc., R. R. Co. v. Becker, Admx., 146 Ind. 202..	69
Stockton v. Stockton, 73 Ind. 510	411	Terre Haute, etc., R. R. Co. v. Graham, 95 Ind. 286.....	502, 504, 510
Stone v. Brown, 116 Ind. 78....	243	Terre Haute, etc., R. R. Co. v. Mason, 148 Ind. 578.....	133
Stone v. Crocker, 24 Pick. (Mass.) 81.....	134	Thacker v. Thacker, 125 Ind. 489	19
Story v. State, 99 Ind. 413..	406, 407	Thiebaud v. Tait, 138 Ind. 238	605
Stott v. Smith, 70 Ind. 298....	369	Thiebaud, Tr., v. Union Furni- ture Co., 143 Ind. 340.....	157
Stout v. Duncan, 87 Ind. 383.....	435	Thomas v. American, etc., Co., 47 Fed. 550.....	463
Stout v. State, 90 Ind. 1....	407, 410	Thomas v. Brown, 10 Ohio St. 247.....	162
Stout v. Stout, 77 Ind. 537....	364	Thomas v. Passage, 54 Ind. 106	369
Strader v. State, 92 Ind. 376....	340		
Street v. Chapman, 29 Ind. 142	157		

TABLE OF CASES CITED.

xxiii

Thomas v. Town of Butler, 139 Ind. 245.....	48	Union Life Ins. Co., v. Buch- anan, 100 Ind. 63.....	406
Thomas, Admr., v. Merry, 113 Ind. 83.....	461	Union National Bank v. Goetz, 138 Ill. 127.....	143
Thompson v. Beacon Valley Rubber Co., 56 Conn. 493....	134	Union School Tp. v. First Nat'l Bank, 102 Ind. 464....	305
Thompson v. Connecticut, etc., Ins. Co., 139 Ind. 325....	192	Union Trust Co. v. Trumbull, 137 Ill. 146.....	576
Thompson v. Pennsylvania R. R. Co., 48 N. J. Eq. 105....	325	United States v. Beebe, 127 U. S. 338.....	294, 295
Thorne v. First Nat'l Bank, 37 Ohio St. 254.....	576, 582	United States v. Le Baron, 19 How. 73.....	228
Thorp v. Hanes, 107 Ind. 324....	422	United States v. Nashville, etc., R. W. Co., 118 U. S. 120	294, 296
Thorpe Block Savings and Loan Association v. James, 13 Ind. App. 522.....	129, 131	United States Saving Fund, etc., Co. v. Harris, 142 Ind. 226	213
Tinkham v. Smith, 56 Vt. 187....	592	Updegraff v. Palmer, 107 Ind. 181	599
Todd v. State, 31 Ind. 514.....	343	Uppinghouse v. Mundel, 103 Ind. 238	133
Toner v. Fulkerson, 125 Ind. 224	61	Uridias v. Morrill, 22 Cal. 473....	183
Town of Albion v. Hetrick, 90 Ind. 545.....	73	Utterback v. Terhune, 75 Ind. 363.....	485
Town of Marion v. Skillman, 127 Ind. 130.....	281, 282	Vawter v. Gilliland, 55 Ind. 278	689
Tracewell v. Peacock, 55 Ind. 572	304	Viall v. Carpenter, 80 Mass. 126	218, 219, 220
Trentman v. Wiley, 85 Ind. 33	39	Vickery v. Board, etc., 134 Ind. 554	120
Trippe v. Hunccheon, 82 Ind. 307	61	Vinnedge v. Shaffer, 35 Ind. 341	213, 420
Trittipo v. Morgan, 99 Ind. 269	498	Vogel v. Brown School Town- ship, 112 Ind. 317.....	100
Troyer v. Dyar, 102 Ind. 396....	371	Vogel v. Brown Township, 112 Ind. 301.....	100
Trustees of McIntire, etc., v. Zanesville, etc., Co., 9 Ohio 203	463	Vogel v. Lechner, 102 Ind. 55.....	19, 359
Tucker v. Sellers, 130 Ind. 514	176	Voorhees v. Carpenter, 127 Ind. 300	582
Tufts v. State, ex rel., 119 Ind. 232	254	Vordermark v. Wilkinson, 142 Ind. 142	252
Turner v. Buchanan, 82 Ind. 147	73	Vorels v. Nussbaum, 131 Ind. 267	19
Turner v. Conkey, 132 Ind. 248	558	Voss v. Eller, 109 Ind. 260..	119
Turner v. Shaw, 9 Am. St. 323	158	Wachstetter v. State, 99 Ind. 290	402
Turner v. State, 102 Ind. 425....	642	Waldo v. Wallace, 12 Ind. 569	183
Tyler v. State, 21 Tenn. 37....	343	Walker v. Board, etc., 11 Ind. App. 285.....	122
Tyler v. Thompson, 44 Tex. 497	390	Walker v. State, 102 Ind. 502....	399
Ueker, Admx., v. Bedford Blue Stone Co., 142 Ind. 673....	559		
Uhl v. Harvey, 78 Ind. 26.....	39		

Wallace v. Brown, 41 Ind. 436 .....552	Western Union Tel. Co. v. Steele, 108 Ind. 163.....300
Wallace v. Milligan, 110 Ind. 498 .....544	Western Union Tel. Co. v. Wilson, 108 Ind. 308.....301
Walsh, Treas., v. State, ex rel., 142 Ind. 357.....513	Western Union Tel. Co. v. Young, 93 Ind. 118.....406
Wample v. State, 148 Ind. 557.....274. 313	Westfield Gas and Milling Co. v. Mendenhall, 142 Ind. 538.320
Ware v. State, 74 Ind. 181....243	Wheatland v. Dodge, 51 Mass. 502 53
Ware v. Supreme Sitting (N. J.), 28 Atl. 1041.....384	Whitcomb v. Smith, 123 Ind. 329 .....290
Ware v. United States, 4 Wal- lace 617.....228	White v. Bass, 7 Hurl. & Norm. 722 .....217
Warrick, etc., Ass'n v. Houg- land, 90 Ind. 115.....553	White v. Haugh, 2 Strange *1262 .....150
Wartman v. Wartman, Taney's Dec. (U. S.) 362....325	Whitesides v. Hunt, 97 Ind. 191 .....145
Waterman v. Morgan, 114 Ind. 237 .....431	White Water Valley R. R. Co. v. McClure, 29 Ind. 536....179
Watson v. Camper, 119 Ind. 60 .....477	Wilbridge v. Case, 2 Ind. 36. 479
Watson v. Citizens' Savings Bank, 5 S. C. 159.....325	Wilcox Silver Plate Co. v. Schimmel, 59 Mich. 524....325
Watson Coal, etc., Co. v. Cas- teel, 73-Ind. 296..... 50	Wilder v. Keeler, 3 Paige 164.388
Watt v. Pittman, 125 Ind. 168. 44	Wild's Case, 6 Coke 17..... 53
Watts v. Sweeney, 127 Ind. 116 .....605	Wiley v. State, 52 Ind. 516. 235
Way v. Cutting, 20 N. H. 187.245	Wilkinson v. Arnold, 11 Ind. 45 .....133
Weakley v. Wolf, 148 Ind. 208.148	Wilkinson v. Moore, 79 Ind. 397 .....558
Webb v. Simpson, 105 Ind. 327 .....459	Williams v. State, 52 Ala. 411.403
Webb v. Trescony, 76 Cal. 621 .....635	Williams v. State, 2 Sneed. (Tenn.) 162.....150
Weed v. Edmonds, 4 Ind. 468.414	Williams v. Thames, etc., Trust Co., 105 Ind. 420....119
Wels v. City of Madison, 75 Ind. 241 .....672	Williams v. Vanmeter, 8 Mo. 339 .....134
Wells, Fargo & Co. v. Ore- gon, etc., R. W. & Nav. Co., 19 Fed. 20 .....325	Wilson v. Johnson, 145 Ind. 40.. .....531
Wenning v. Teeple, 144 Ind. 189 .....559	Wilson v. Jordan, 3 Woods (U. S. Cir. Ct.) 642.....451, 452
West v. Cavins, 74 Ind. 265...459	Wilson v. Kelly, 16 S. C. 216..592
West River Bridge Co. v. Dix, 6 How. (U. S.) 507.....180	Wilson v. Trafalgar, etc., Grav. R. Co., 83 Ind. 326... 73
Western Paving, etc., Co. v. Citizens' Street R. R. Co., 128 Ind. 525.....120	Wilson v. Trafalgar, etc., Grav. R. Co., 93 Ind. 287... 73
Western Union Tel. Co. v. Brown, 108 Ind. 538.....300	Wilson v. Wilson, 113 Ind. 415 .....161
Western Union Tel. Co. v. Semmes, 73 Md. 9.....635	Winchester v. Veal, 145 Ind. 506 .....546
Western Union Tel. Co. v. State, 147 Ind. 274.....352	Wiseman v. Wiseman, 73 Ind. 112 .....159
	Wood v. Baron, 1 East. 259... 53
	Wood v. Board., etc., 125 Ind. 270 .....151

TABLE OF CASES CITED.

xxv

Wood v. Carpenter, 101 U. S. 135	243, 245	Wright v. Churchman, 135 Ind. 683.....	113
Wood v. Harrison, 50 Ind. 480. 60		Wright v. Defrees, 8 Ind. 298. 665	
Wood v Ostram, 29 Ind. 177..	371	Wright v. Jones, 105 Ind. 17..	
Wood v. State, 92 Ind. 269...	404	.....	159, 161
Wood v. State, 130 Ind. 364...		Wright v. Manns, 111 Ind. 422	98
.....	226, 354	Wright v. Nipple, 92 Ind. 310. 487	
Woodard v. Baker, 116 Ind. 152	454	Wright v. Wright, 97 Ind. 444. 419	
Woods v. State, 134 Ind. 35..		Wynne v. Cornellison, 52 Ind. 312	243
.....	398, 703	Yellow Hammer, etc., Co. v. Carlin, 148 Ind. 68.....	709
Woodward v. Murdock, 124 Ind. 437.....	617, 623	Yocum v. Polly, 1 B. Monroe 358	134
Woolaston v. Tribe, L. R. 9 Eq. 44	433	Yonkey v. State, 27 Ind. 236..	
Woolery v. Grayson, 110 Ind. 149	478	.....	231, 288, 290
Workman v. Shelly, 79 Ind. 442	133	Yost v. Yost, 141 Ind. 584....	468
Worth v. Patton, 5 Ind. App. 272	162	Young v. State, 138 Ind. 206..	315
Wray v. Hill, 85 Ind. 546. ...	192	Zigler v. Menges, 21 Ind. 99..	94
Wright v. Board, etc., 82 Ind. 335	516		

STATUTES CITED AND CONSTRUED.

Const., Art. 1, Section 18.....	619, 644
Const., Art. 1, Section 16.....	613
Const., Art. 1, Section 18.....	614
Const., Art. 1, Section 19.....	645
Const., Art. 3, Section 1.....	620
Const., Art. 5, Section 17.....	623
Const., Art. 6, Section 6.....	287
Const., Art. 7, Section 1.....	620
Const., Art. 10, Section 1.....	298
1 U. S. Stat. at Large, p. 733.....	227
4 U. S. Stat. at Large, p. 298.....	227
5 U. S. Stat. at Large, p. 80.....	227
5 U. S. Stat. at Large, p. 732.....	227
9 U. S. Stat. at Large, p. 147.....	227
9 U. S. Stat. at Large, p. 189.....	227
9 U. S. Stat. at Large, p. 589.....	228
10 U. S. Stat. at Large, p. 249.....	228
Section 61, Burns' R. S. 1894 (61, R. S. 1881).....	613
Section 66, Burns' R. S. 1894.....	27
Section 224, Burns' R. S. 1894 (224, R. S. 1881).....	197, 205
Sections 243, 248, Burns' R. S. 1894.....	504
Section 248, Burns' R. S. 1894 (248, R. S. 1881).....	300
Section 251, Burns' R. S. 1894 (251, R. S. 1881).....	437, 438
Section 269, Burns' R. S. 1894 (286, R. S. 1881).....	63
Section 272, Burns' R. S. 1894.....	115
Section 294, Burns' R. S. 1894 (293, R. S. 1881).....	294
Section 301, Burns' R. S. 1894 (300, R. S. 1881).....	242
Section 305, Burns' R. S. 1894 (304, R. S. 1881).....	294, 295
Section 314, Burns' R. S. 1894 (312, R. S. 1881).....	63
Section 341, Burns' R. S. 1894 (338, R. S. 1881).....	302
Section 365, Burns' R. S. 1894 (362, R. S. 1881).....	522
Section 370, Burns' R. S. 1894 (367, R. S. 1881).....	591
Section 386, Burns' R. S. 1894 (383, R. S. 1881).....	479
Section 399, Burns' R. S. 1894 (396, R. S. 1881).....	441, 556, 557
Section 401, Burns' R. S. 1894 (398, R. S. 1881).....	439
Section 422, Burns' R. S. 1894.....	184
Section 481, Burns' R. S. 1894.....	508
Section 507, Burns' R. S. 1894 (499, R. S. 1881).....	426
Section 562, Burns' R. S. 1894 (553, R. S. 1881).....	553
Section 579, Burns' R. S. 1894 (570, R. S. 1881).....	63
Sections 624, 625, Burns' R. S. 1894 (612, 613, R. S. 1881).....	556
Section 638, Burns' R. S. 1894.....	80

STATUTES CITED AND CONSTRUED. xxvii

Section 642, Burns' R. S. 1894 (630, R. S. 1881).....	453
Sections 644, 658, Burns' R. S. 1894 (632, 646, R. S. 1881).....	165
Section 647, Burns' R. S. 1894 (635, R. S. 1881).....	98
Section 652, Burns' R. S. 1894 (640, R. S. 1881).....	107
Section 663, Burns' R. S. 1894 (651, R. S. 1881).....	107
Section 670, Burns' R. S. 1894 (658, R. S. 1881).....	145, 414, 439
Sections 715, 730, Burns' R. S. 894 (708, 718, Horner's R. S. 1897)	514
Section 746, Burns' R. S. 1894 (734, R. S. 1881).....	212
Section 764, Burns' R. S. 1894 (752, R. S. 1881).....	213
Section 925, Burns' R. S. 1894 (913, Horner's R. S. 1897)...	514
Section 928, Burns' R. S. 1894 (916, Horner's R. S. 1897)...	514
Section 943, Burns' Supplement 1897 (931, Horner's R. S. 1897)	512, 513, 514
Section 971, Burns' Supplement 1897 (959, Horner's R. S. 1897)	516
Section 1019, Burns' R. S. 1894 (1007, Horner's R. S. 1897)...	324
Section 1025, Burns' R. S. 1894 (1013, Horner's R. S. 1897)...	324
Section 1026, Burns' R. S. 1894 (1014, Horner's R. S. 1897)...	324
Section 1069, Burns' R. S. 1894 (1057, R. S. 1881).....	88
Section 1086, Burns' R. S. 1894 (1073, R. S. 1881).....	437, 438
Section 1100, Burns' R. S. 1894 (1087, R. S. 1881).....	13
Section 1145, Burns' R. S. 1894 (1131, R. S. 1881).....	234
Section 1200, Burns' R. S. 1894 (1186, R. S. 1881).....	474
Section 1201, Burns' R. S. 1894 (1187, R. S. 1881).....	487
Section 1203, Burns' R. S. 1894	474, 475
Section 1207, Burns' R. S. 1894	474
Section 1226, Burns' R. S. 1894 (1212, R. S. 1881).....	486
Section 1358, Burns' R. S. 1894	66
Sections 1429, 1444, 1446, 1447, Burns' R. S. 1894 (1371a, 1381, 1383, 1383a, Horner's R. S. 1897)	642
Sections 1498, 1499, 1506, Burns' R. S. 1894 (1431, 1432, 1441, R. S. 1881).....	558
Section 1571, Burns' R. S. 1894 (1508, R. S. 1881).....	557
Section 1642, Burns' R. S. 1894 (1573, R. S. 1881).....	644
Section 1814, Burns' R. S. 1894 (1745, R. S. 1881).....	688
Section 1818, Burns' R. S. 1894 (1749, R. S. 1881).....	702
Section 1833, R. S. 1881.....	631
Section 1840, Burns' R. S. 1894 (1771, R. S. 1881).....	696
Section 1862, Burns' R. S. 1894 (1793, Horner's R. S. 1897) 398, 400	
Section 1892, Burns' R. S. 1894 (1823, Horner's R. S. 1897)...	411
Section 1906, Burns' R. S. 1894 (1837, Horner's R. S. 1897) 609, 643	
Section 1911, Burns' R. S. 1894 (1842, R. S. 1881).....	705
Section 1964, Burns' R. S. 1894 (1891, Horner's R. S. 1897) 412, 702	
Section 1981, Burns' R. S. 1894 (1908, R. S. 1881).....	696, 705
Section 2002, Burns' R. S. 1894 (1929, R. S. 1881).....	587, 614
Section 2007, Burns' R. S. 1894 (1934, R. S. 1881).....	646, 647
Section 2063, Burns' R. S. 1894 (1984, R. S. 1881).....	697
Section 2076, Burns' R. S. 1894 (1990, R. S. 1881).....	47
Section 2352, Burns' R. S. 1894 (2204, Horner's R. S. 1897)...	338
Section 2609, Burns' R. S. 1894 (2454, Horner's R. S. 1897)...	459
Sections 2640, 2652, Burns' R. S. 1894 (2483, 2491, R. S. 1881)...	157
Section 2641, Burns' R. S. 1894 (2484, R. S. 1881).....	419
Section 2642, Burns' R. S. 1894 (2485, R. S. 1881).....	157
Section 2651, Burns' R. S. 1894 (2490, R. S. 1881).....	156, 157

xxviii STATUTES CITED AND CONSTRUED.

Section 2666, Burns' R. S. 1894	367
Section 2766, Burns' R. S. 1894 (2596, R. S. 1881).....	36
Section 2767, Burns' R. S. 1894 (2597, R. S. 1881).....	34
Section 2771, Burns' R. S. 1894 (2601, R. S. 1881).....	36
Section 2911, Burns' R. S. 1894 (2674, R. S. 1881).....	307
Sections 2942, 2946, 2947, Burns' R. S. 1894.....	185
Section 3106g, Horner's R. S. 1897	256
Sections 3340, 6961, 6962, Burns' R. S. 1894 (2921, 5116, 5117, R. S. 1881).....	158
Section 3352, Burns' R. S. 1894 (2933, R. S. 1881).....	184
Sections 3360-3362, Burns' R. S. 1894	185
Sections 3386, 3387, Burns' R. S. 1894	185
Section 3418, Burns' R. S. 1894 (2996, R. S. 1881).....	541
Section 3429, Burns' R. S. 1894.....	184
Section 3623, Burns' R. S. 1894.....	176, 178, 179
Sections 3623, 3629, et seq., Burns' R. S. 1894.....	26
Section 3629, Burns' R. S. 1894 (3166, R. S. 1881)....	180, 184, 185
Sections 3629, 3657, Burns' R. S. 1894.....	178, 179
Section 3630, Burns' R. S. 1894.....	186
Sections 3631, 3634, Burns' R. S. 1894	179
Section 3636, Burns' R. S. 1894.....	26, 27
Section 3644, Burns' R. S. 1894.....	27, 28, 176
Sections 4246-4263, Thornton's R. S. 1897.....	193
Sections 4273-4275, Burns' R. S. 1894	518
Section 4288, et seq., Burns' R. S. 1894.....	597, 600
Section 4290, Burns' R. S. 1894.....	601
Section 4298, Burns' R. S. 1894.....	520
Section 5060, Burns' R. S. 1894 (3859, R. S. 1881).....	60
Section 5077, Burns' R. S. 1894 (3869, R. S. 1881).....	60
Section 5153, Burns' R. S. 1894 (3903, R. S. 1881).....	278, 346
Sections 5186, 5187, Burns' R. S. 1894	295
Section 5656, Burns' R. S. 1894 (4286, R. S. 1881).....	93
Section 5690, et seq., Burns' R. S. 1894	117
Section 5704, Burns' R. S. 1894.....	117
Section 5900, Burns' R. S. 1894 (4424, R. S. 1881).....	268
Section 5920, Burns' R. S. 1894 (4444, R. S. 1881).....	254
Sections 5920a-5920c, Burns' R. S. 1894 (4444a-4444c, Hor- ner's R. S. 1897).....	254
Section 5969, Burns' R. S. 1894.....	593
Section 5996, R. S. 1881.....	314
Section 6339, R. S. 1881.....	300
Section 6397, R. S. 1881.....	185
Section 6545, Burns' R. S. 1894 (E. S. 1972).....	151
Section 6638, Burns' R. S. 1894 (4913, Horner's R. S. 1897)	574, 580, 581
Section 6964, Burns' R. S. 1894 (5119, R. S. 1881).....	17, 19
Section 7083, Burns' R. S. 1894.....	170
Section 7291, Burns' R. S. 1894....	184
Section 7300, Burns' R. S. 1894.....	184
Section 7801, Burns' R. S. 1894 (5833, R. S. 1881).....	99
Section 7815, Burns' R. S. 1894 (5731, R. S. 1881).....	287
Section 7816, Burns' R. S. 1894.....	287
Section 7937, Burns' R. S. 1894.....	184
Section 7945, Burns' R. S. 1894 (5868, R. S. 1881).....	151
Section 7973, Burns' R. S. 1894 (5895, R. S. 1881).....	313

STATUTES CITED AND CONSTRUED. xxix

Section 8035, Burns' R. S. 1894.....	184
Section 8068, Burns' R. S. 1894 (5993, R. S. 1881).....	312
Section 8070, Burns' R. S. 1894 (5995, R. S. 1881).....	313
Section 8075, Burns' R. S. 1894 (6000, R. S. 1881).....	312
Section 8105, Burns' R. S. 1894 (6029, R. S. 1881).....	165
Section 8238, Burns' R. S. 1894.....	623
Section 8410, Burns' R. S. 1894.....	301
Section 8458, Burns' R. S. 1894.....	298, 299, 301
Section 8463, Burns' R. S. 1894.....	301
Section 8465, Burns' R. S. 1894.....	301
Section 8704, Burns' R. S. 1894 (6525, Horner's R. S. 1897).....	568, 569
Sections 8704-8719, Burns' R. S. 1894 (6525-6540, Horner's R. S. 1897)	570, 575
Sections 8716, 8722, 8729, Burns' R. S. 1894 (6537, 6543, 6550, Horner's R. S. 1897).....	568
Sections 8720-8729, Burns' R. S. 1894 (6541-6550, Horner's R. S. 1897)	570, 573
Section 8724, Burns' R. S. 1894 (6545, Horner's R. S. 1897).....	575
R. S. 1843, pp. 424-427.....	55
1 R. S. 1852, pp. 215, 216.....	184, 185
1 R. S. 1852, pp. 235, 239, 361, 363, 377.....	184
2 R. S. 1852, p. 8.....	184
2 R. S. 1852, p. 22.....	184
2 R. S. 1852, p. 78.....	294
2 R. S. 1852, p. 84.....	184
1 Davis R. S. 1876, p. 411.....	419
2 Davis R. S. 1876, p. 129.....	294
2 Gavin & Hord, p. 164.....	294
Acts 1857, p. 61.....	185
Acts 1857, p. 82.....	185
Acts 1857, p. 661.....	184
Acts 1861, p. 154.....	185
Acts 1867, p. 63.....	185
Acts 1869, p. 104.....	185
Acts 1875, p. 17.....	185
Acts 1875, p. 172.....	570
Acts 1879, p. 130.....	165
Acts 1879, p. 231.....	570, 573
Acts 1881, p. 10.....	324
Acts 1881, p. 611.....	185
Acts 1885, p. 239.....	367
Acts 1891, p. 122.....	176
Acts 1891, p. 326.....	520
Acts 1891, p. 455.....	117
Acts 1893, p. 17.....	254
Acts 1893, p. 54.....	663
Acts 1893, p. 195.....	593, 594
Acts 1893, p. 294.....	170
Acts 1893, p. 332.....	518
Acts 1895, p. 21.....	302
Acts 1895, p. 26.....	301, 302
Acts 1895, p. 63.....	193
Acts 1895, p. 75.....	185
Acts 1895, p. 153.....	594
Acts 1895, p. 248.....	66, 353

xxx STATUTES CITED AND CONSTRUED.

Acts 1895, p. 319.....	151
Acts 1897, p. 69.....	609, 643
Acts 1897, p. 90.....	256
Acts 1897, p. 184.....	47
Acts 1897, p. 233.....	512
Acts 1897, p. 234.....	516
Acts 1897, p. 244.....	148, 560, 265

JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. JAMES McCABE. * †
HON. TIMOTHY E. HOWARD. ‖ †
HON. LEONARD J. HACKNEY. †
HON. LEANDER J. MONKS. ‡
HON. JAMES H. JORDAN. ‡

* Chief Justice at May Term, 1897.

‖ Chief Justice at November Term, 1897.

† Term of office commenced January 1, 1898.

‡ Term of office commenced January 1, 1895.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
 ARGUED AND DETERMINED
 IN THE
Supreme Court of Judicature
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, MAY AND NOVEMBER TERMS, 1897, IN
 THE EIGHTY-FIRST AND EIGHTY-SECOND
 YEARS OF THE STATE.

EWING *v.* BASS ET AL.

[No. 17,512. Filed November 18, 1897.]

TRUST DEEDS.—*Revocation.*—Where a son twenty-two years of age having no business capacity or business experience, intemperate in habits and easily influenced, conveyed to his father, a man of great ability and force of character, his entire estate, valued at \$50,000.00, in trust, and at the death of such son to descend to his legal representatives, for a nominal consideration of \$800.00, which was never in fact paid, the understanding between the father and son at the time being that such conveyance should only be temporary, such deed being so unconscionable and so impressed with undue influence could not be upheld in equity, and a reconveyance of the property by the father to the son was an act which equity and good conscience required, and the legal representatives of the son at his death had no title to such lands which he had conveyed to *bona fide* purchasers after such reconveyance. *pp. 2-9.*

EVIDENCE.—*Quieting Title.*—*Declarations Made at Time of Conveyance.*—In an action to quiet title to real estate declarations made as a part of the negotiations leading up to a reconveyance of the real estate by a trustee were admissible as tending to show the reason why the deed of reconveyance was executed. *pp. 9, 10.*

149	1
149	437
149	1
161	363

Ewing v. Bass et al.

SAME.—*Waiver of Objections.*—Where a party in the trial of an action to quiet title to real estate introduces declarations made by the grantor relative thereto, after the execution of such deed, he cannot complain of the introduction in evidence by his adversary of declarations made by the parties at the time of the execution thereof. *p. 10.*

From the Allen Superior Court. *Affirmed.*

L. M. Ninde & Sons, for appellant.

Morris, Bell, Barrett & Morris, for appellees.

JORDAN, J.—Appellant prosecuted this action in the lower court to recover the possession of certain described real estate, and to quiet title thereto. The trust deed, through and under which appellant claims title to the lands herein involved, is the same which was before this court and received consideration in the cases of *Ewing v. Jones*, 130 Ind. 247; *Ewing v. Lutz*, 131 Ind. 361, and *Ewing v. Wilson*, 132 Ind. 223.

In the case at bar, the appellees filed a cross-complaint, praying that their title to the realty in question be quieted. The court made a special finding of facts and stated its conclusions of law thereon in favor of appellees, and, over a motion for a new trial by appellant, rendered judgment accordingly.

The facts, which appear to be uncontroverted, are as follows: On December 31, 1863, Geo. W. Ewing, Jr., being the owner of a large amount of property, devised to him by his uncle, William G. Ewing, executed on that day to Geo. W. Ewing, Sr., his father, the trust deed in dispute, whereby he conveyed to the latter, in trust, all of his said property. Omitting the description of the property and the certificate of acknowledgment, said deed is as follows: "This indenture witnesseth, that George W. Ewing, junior, a devisee of William G. Ewing, deceased, late of Allen county, Indiana, in consideration of six hundred dollars, and other good and sufficient considerations, does by these presents, give, grant, bargain and sell to

Ewing v. Bass *et al.*

George W. Ewing, of Cook county, Illinois, father of said George W. Ewing, Jr., the following described real estate, * * * * (here follow descriptions of certain tracts of real estate in Missouri, Illinois, Indiana, Wisconsin, Minnesota, and Ohio) * * * * and also the estate real and personal * * * * as has or may descend to the grantor under and by the will of said William G. Ewing, deceased (in each of said states), and also all the estate of every name and nature, wherever situated, which has descended or may descend to the grantor under and by virtue of the will of William G. Ewing, deceased, intending by this conveyance to make the grantee, father of the grantor, trustee for all the property of the grantor, wheresoever situated. To have and to hold the same to the said George W. Ewing in trust for the uses and purposes following, to wit: First. The said George W. Ewing, trustee, as aforesaid, shall sell and convey all such part or parts of the real estate hereby conveyed to him as he shall deem most advantageous for the interest of the trust hereby created, and the proceeds thereof to invest for the same purpose for which this trust is created, or to expend the same in improving such of the property hereby conveyed as the said trustee shall deem most advisable, and for the purpose of creating an income therefrom. Second. That of the income and profits arising under this trust a reasonable sum, such as the said trustee shall deem to be sufficient, shall be expended for the maintenance of the said George W. Ewing, junior, and the remainder, if any, after paying taxes, insurance, and necessary expenses, shall be expended for the benefit of the trust, when and at such times as the trustee shall think best. Third. Should the said trustee die before his said ward, that Jesse Holliday, of San Francisco, California, or, upon his refusal to act, such person as the

Ewing v. Bass et al.

Court of Common Pleas of Allen county, Indiana, shall appoint, shall take up and continue this trust. Fourth. That upon the death of the said George W. Ewing, junior, the property hereby placed in trust shall descend to the legal representatives of the said George W. Ewing, junior, provided, however, that William G. Ewing, junior, adopted son of the said William G. Ewing, deceased, shall under no circumstances whatever inherit or be entitled to any part or parcel thereof. In witness whereof the said George W. Ewing, junior, has hereunto set his hand and seal, this 31st day of December, A. D. 1863. George W. Ewing, Jr. Seal." (Attestation following.)

On March 1, 1866, Ewing, Sr., executed to his said son, Ewing, Jr., a deed of revocation, whereby he reconveyed to him the property embraced in the trust deed; said instrument of reconveyance being as follows (omitting the description of the property and the certificate of acknowledgment): "Whereas, on the 31st day of December, 1863, A. D., by his conveyance of that date, George W. Ewing, Jr., conveyed to George W. Ewing, the father of said George W. Ewing, Jr., in trust for the uses and purposes therein mentioned, the real and personal estate in said conveyance described, which descended to him from his uncle, William G. Ewing, deceased; and, whereas, it is now desired that said trust should be terminated and the unsold property mentioned in said trust deed should be reconveyed to said George W. Ewing, Jr. Now, therefore, in consideration of the premises the said George W. Ewing, trustee, as aforesaid, does by these presents quitclaim and reconvey to the said George W. Ewing, Jr., all the following described real estate: [Here follows description.] Meaning and intending by this conveyance to reconvey to the said George W.

Ewing v. Bass et al.

Ewing, Jr., only such of the property conveyed to the grantor herein by the conveyance of December 31, 1863, as remains unsold; and, also, intending by this conveyance to convey to said George W. Ewing, Jr., all such property as the trustee acquired by virtue of said trust, particularly that acquired in an exchange of property with Mary L. Guthrie and husband for the benefit of said trust. To have and to hold the same to said George W. Ewing, Jr., and his heirs and assigns as fully and amply as the grantor is authorized to reconvey the same. In witness whereof the grantor has hereunto set his hand and seal, this 1st day of March, A. D. 1866. George W. Ewing. Seal."

George W. Ewing, Jr., was born on July 20, 1841, and at the time he executed the trust deed to his father he was unmarried and had no one dependent upon him for support. On November 2, 1865, he was married to Mary C. Sweetzer, and on September 6, 1866, appellant was born as the fruits of said marriage. After the reconveyance of the property by the father to his son George, it seems to have passed under the management and control of the latter. Ewing, Sr., died on May 29, 1866, and on December 2, 1872, Ewing, Jr., died, leaving his said wife and the appellant, his son, surviving him as his only heirs at law.

The real estate here in controversy was a part of that embraced in the trust deed and in the deed of reconveyance; and the appellees claim title as *bona fide* purchasers through Ewing, Jr., after the execution of the last mentioned instrument.

The following, in substance, are other material facts, fully supported by the evidence, and found by the court under the issues in the cause: George W. Ewing, Jr., at the time he executed the trust deed to his said father, George W., Sr., was but a few months

Ewing v. Bass et al.

deed, or the powers granted thereby should be revoked, but in the meantime the father should, under the deed, manage the property, in order that it might produce an income for the son; that said deed was, at the instance of the father, prepared by William Lytel and B. D. Miner, one his confidential bookkeeper and the other his confidential business manager, both of whom were devoted to the interests of the father and controlled by his wishes; no professional counsel was present or consulted.

The issues and facts in this case, and the questions which they present, in the main, are substantially the same as were those in *Ewing v. Wilson, supra*, and if the holding in that case is adhered to, it conclusively settles the principal questions involved in this appeal, and the judgment must be affirmed. The contention in that case, as it is in this, was that Ewing, Jr., by his deed of trust intended to deprive himself of all dominion and control over his property and vest the same irrevocably in his father, Ewing, Sr., and that the deed of reconveyance by the father to the son did not serve to revoke the trust and again vest the title in the son, and, consequently, at the death of the latter, the appellant, as his heir, under the provisions of the trust deed, became the owner of the property.

This court, in the case above referred to, under the facts therein, and the law applicable thereto, refused to sustain this contention. The court, as then constituted, held, in effect, that the trust deed was so unconscionable and so impressed with undue influence that in equity it could not be upheld. That the reconveyance of the property by the father to the son was simply an act which equity and good conscience required the former to perform; therefore, the deed reconveying the land was rightfully executed and should stand. Elliott, J., speaking for the court in

Ewing v. Bass et al.

over the age of twenty-two years. Prior thereto, Ewing, Jr., had been in the army of the United States for about one year, and had but recently before the execution thereof returned home. That at and prior to the time he made this deed to his father, he had no business capacity or business experience whatever, was of intemperate habits, easily influenced, and was particularly subject to and under the influence of his said father; that this deed embraced all of the property or estate which he owned, and was of the value of \$50,000.00; that Ewing, Sr., the father and trustee, at the date of the deed was a man of great wealth, and had much experience in business matters, possessed great ability and force of character, and, in general, carried or had matters his own way in his dealings with persons connected with him, and had a commanding influence over his said son, George W., Jr., and other members of his family; that the deed in question was executed by Ewing, Jr., to his father in compliance with the suggestions and the dictation of the latter. The consideration of \$600.00 mentioned in the deed of trust was nominal, and, in fact, was never actually paid by the trustee, as recited, but only advanced out of the future income of the property conveyed by the trust deed, and in an accounting subsequently had between said father and son, it was retained by the former out of said income. At the time of the execution of the trust deed, the father, for the purpose of preventing his son George W. Ewing, Jr., from again enlisting in the army, had directed him to go to California; that the son agreed to go, and did, soon after the deed was made, go to said state; that said Ewing, Sr., and Ewing, Jr., both, at the time the trust deed was executed, understood that it should only be temporary, and on the return of the latter from California, or as soon as the son desired, this

Ewing v. Bass et al.

deed, or the powers granted thereby should be revoked, but in the meantime the father should, under the deed, manage the property, in order that it might produce an income for the son; that said deed was, at the instance of the father, prepared by William Lytel and B. D. Miner, one his confidential bookkeeper and the other his confidential business manager, both of whom were devoted to the interests of the father and controlled by his wishes; no professional counsel was present or consulted.

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This court, in the case above referred to, under the facts therein, and the law applicable thereto, refused to sustain this contention. The court, as then constituted, held, in effect, that the trust deed was so unconscionable and so impressed with undue influence that in equity it could not be upheld. That the reconveyance of the property by the father to the son was simply an act which equity and good conscience required the former to perform; therefore, the deed reconveying the land was rightfully executed and should stand. Elliott, J., speaking for the court in

Harrison Building and Deposit Company v. Lackey.

desired it. These declarations were communicated by William A. to the father, and the latter did not deny but what such was the agreement between him and his son, but at first declined to reconvey for the reason stated that if his son had the property he would waste it. The declarations in controversy seem to have been made as part of the negotiations leading up to the execution of the deed of reconveyance, and in consideration of the fact that they were communicated to the trustee, who did not deny them, they were clearly competent as evidence, under the circumstances, tending to show the reason why the deed of reconveyance was executed by the trustee. But if it could be said that this evidence was incompetent its admission would not result in a reversal, because the appellant had previously on the trial, over the objections of appellees, introduced in evidence declarations made by Geo. W. Ewing, Jr., relative to the trust deed, long after its execution. In this, appellant opened the door to what he now insists is incompetent evidence, hence he is not in a position to complain of his adversary for following through the same door. Elliotts' App. Proc., section 628.

Under the facts in this case, and the law applicable thereto, appellant has no title to the lands which he seeks to recover, and the judgment is affirmed.

HARRISON BUILDING AND DEPOSIT COMPANY v. LACKEY.

[No. 18,287. Filed November 18, 1897.]

PLEADING.—Variance.—When the allegations of a pleading vary from the provisions of the instrument upon which it is founded, the provisions of such instrument control, and such allegations will be disregarded. *p. 14.*

HUSBAND AND WIFE.—Contract of Suretyship.—*Building and Loan Association.*—*Mortgage.*—*Foreclosure.*—Where a mortgage executed by a husband and wife on real estate held by them as tenants

149	10
182	193
149	10
1167	100

Harrison Building and Deposit Company v. Lackey.

by entireties to a building association, conditioned that if the husband, who was a member of such association, and the holder of two shares of stock therein, upon which had been advanced to him the sum of \$1,000.00, would pay to said association certain stipulated sums per week, until the dues paid should equal the amount advanced, or until the dissolution of such company, then such obligation should be void, such mortgage did not secure the repayment of the money advanced, but only secured the payment of the weekly dues, interest, premiums, fines, and assessments, as therein specified, of the husband as a member of such association, and such mortgage was, as to the wife, a contract of suretyship, and void under the provisions of section 6964, Burns' R. S. 1894 (5119, R. S. 1881). pp. 11-17.

From the Dearborn Circuit Court. *Affirmed.*

G. M. Roberts and *C. W. Stapp*, for appellant.
Givan & Givan, for appellee.

MONKS, J.—This action was brought by appellant against appellee to foreclose a mortgage on certain real estate in Dearborn county. Appellee's demurrer to the amended complaint was sustained, and appellant refusing to plead further, judgment was rendered in favor of appellee.

It is alleged in the amended complaint that appellee and her said husband executed a mortgage on certain real estate in this State, held and owned by them as tenants by entireties, and that by the terms and conditions of said mortgage they agreed to pay to appellant the sum of one thousand dollars, according to the terms and conditions of the constitution and by-laws of appellant; which said sum of one thousand dollars was, by and with the knowledge of the appellee, and for her use and benefit, borrowed from appellant, at the date of the mortgage, and for the purpose of, and was used in the erection of a dwelling house on the real estate covered by said mortgage; and all the money so borrowed was used for the improvement and betterment of the said real estate, and that said money was so loaned in consideration of the execution of said

Harrison Building and Deposit Company v. Lackey.

mortgage and the agreement of appellee therein to pay the mortgage.

It is stated in the mortgage, which was executed in the state of Ohio, and which is made a part of the amended complaint, that appellant is a building association, organized under the laws of the state of Ohio, and that one Frank Lackey, husband of appellee, was a member of said association, the holder of two shares of stock therein, and he had received an advance from said association of the sum of one thousand dollars, the par value of said shares of stock; and it is provided that if said Frank Lackey would pay to said association, according to its constitution and by-laws, until the dues paid shall amount to the shares received in advance from said company, or until the dissolution of said company—(1), the sum of two dollars per week from the date of said mortgage; (2), the sum of one dollar and twenty cents per week from the date of the mortgage, the same being the interest on said sum of one thousand dollars, subject to such abatement as the constitution and by-laws provide; (3), the sum of four cents per week from the date of said mortgage, the same being the weekly premium on said shares; (4), all fines, assessments and penalties which the said Frank Lackey shall incur, and which may be levied upon him as a member of said company, and in accordance with its constitution and by-laws; (5), all rents, taxes, assessments and premiums, of insurance upon the mortgaged premises, in accordance with the constitution and by-laws of said company, then said instrument should be void.

And if default be made in any of the foregoing payments therein provided for, then all such payments shall be considered as due, and the mortgage might be foreclosed.

The by-laws, which are made a part of the amended

Harrison Building and Deposit Company v. Lackey.

complaint, provide, among other things, that the right to have precedence in the payment of shares, shall be determined by auction, and the member bidding the highest weekly premium per share shall be awarded the first money, and he must furnish satisfactory security for the payment of his said premium and for the payment of his dues and interest on the advanced share or shares; until the sum paid in as dues shall amount to \$500.00 per share, the interest shall be sixty cents per week, payable weekly, with an annual reduction of six cents per week. Such security shall consist of first mortgages upon real estate, free from all incumbrance. Whenever the ground alone shall not be sufficient security, the improvements must be insured and the policy of insurance assigned to the company. If a member fails to renew his fire policy at the proper time, and to transfer it to the society, and likewise to hand it over to the secretary, he shall be fined \$2.00. Any member failing or neglecting to submit his security within one week after an advance is awarded him shall be assessed with a fine of one dollar, and every failure to pay dues shall render any member so delinquent liable to a fine of ten cents per share on each week's dues.

There is no promise on the part of appellee contained in the mortgage, or in the record, to pay appellant one thousand dollars, or any other sum, according to the terms and provisions of the by-laws as alleged in the amended complaint. It is expressly provided by statute that no mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured, so as to enable the mortgagee, his assignees or representatives, to maintain an action for the recovery of such sum. Section 1100, Burns' R. S. 1894 (1087, R. S. 1881). The only promise to pay is that of Frank Lackey, the husband of appellee, and

Harrison Building and Deposit Company v. Lackey.

he only agreed to pay his weekly dues on two shares of stock, and the interest each week on the par value of said two shares, and the weekly premium thereon, as well as all fines, assessments and penalties. This is the contract the performance of which is secured by the mortgage. The provision in regard to default in payment is not that the money advanced and interest shall become due and payable, but that the dues, interest, premiums, penalties, fines and assessments provided for shall be considered as due and the mortgage foreclosed.

It is well settled in this State that when the allegations in a pleading vary from the provisions of the instrument upon which it is founded the provisions of such instrument control, and such allegation will be disregarded. *Stengel v. Boyce*, 143 Ind. 642, 646, and authorities cited; *Reynolds v. Louisville, etc., R. W. Co.*, 143 Ind. 579, 621; *Avery v. Dougherty*, 102 Ind. 443, 445; *Hines v. Driver*, 100 Ind. 315, 317, and cases cited. So in this case, where the provisions of the mortgage and by-laws of appellant company differ from the allegations of the amended complaint such allegations must be disregarded.

It is clear, from the terms of the mortgage and the by-laws, that the business of the appellant was confined to its own members, and that said mortgage was not intended to secure, and did not secure, the repayment of the money advanced, but was only intended to secure the payment of the weekly dues, interest, premium, fines and assessments of Frank Lackey as a member of said association.

In *Eversmann, Rec., v. Schmitt*, 53 Ohio St. 174, the supreme court of Ohio said, at page 185: "As before observed, borrowers and nonborrowers participate alike in the earnings of a building association. The difference between them is simply in the time at which

Harrison Building and Deposit Company v. Lackey.

each class is paid the par value of his shares. A borrower before his stock is paid up, receives from the association the par value of his shares, in the nature of an advance loan. For this, he agrees to pay the premium, if any, for the privilege, the interest on the money advanced, subject to abatements to be made at stated times, and the dues on his stock until it matures. In other words, he agrees to keep up and pay out his stock, as if he were a nonborrower, in consideration of the amount being advanced to him before that time. Hence, the borrower remains a stockholder, and participates in all the privileges and benefits of a stockholder; has a voice in the management of the association and participates in its earnings. The latter go toward discharging his obligations arising on the loan, and to shorten the term in which he will be fully discharged therefrom. For, taking all losses into account, whenever the shares of the borrower have reached their par value by the payment of dues and the apportionment of earnings, the loan is liquidated and he ceases to be a member, as he would, if he had not borrowed at all. In other words, with his shares paid up, he discharges his obligations as a borrower. And the exact test of his right to call for a cancellation of the mortgage given to secure his obligations as a borrower, is the inquiry, whether he would have been entitled to receive from the association the par value of the shares on which the loan was made, had he not become a borrower."

In *Hagerman v. Ohio Building and Savings Association*, 25 Ohio St. 186, at page 205, the court said: "In these cases, an account upon the basis of the par value of the stock was not asked for; and it could not have been granted if it had been prayed for. * * * Nor can the amount of the loan advanced be made the basis of the account. The policy upon which these

Harrison Building and Deposit Company v. Lackey.

organizations are founded, does not contemplate that a loan advanced to a member upon his stock will ever be called in. * * * The real transaction between the corporation and such member is equivalent to the redemption of his stock in advance; saving, however, to the member his right as a corporator, and to the corporation its rights to collect from him the stated dues, interest on the loan advanced, and such fines as may be lawfully assessed against him. Such being the true relation of the parties, and such their reasonable expectations, a court of equity, upon breach of the condition of defeasance, by failure to pay stated dues, interest on loan advanced, or fines assessed, will not state an account on the basis of the loan advanced; but will ascertain the amount of dues, interest, and fines due and unpaid, and will decree accordingly."

If said mortgage was only intended to secure and only attempts to secure the agreement and liability of Frank Lackey, appellee's husband, as a member, to to pay weekly dues, interest, premium, fines, and assessments, then no part of what is secured by said mortgage was ever expended upon the real estate described in the mortgage, or for its betterment, as alleged in the amended complaint.

It was held by this court in *Bartholomew v. Pierson*, 112 Ind. 430, and in other cases cited by appellant, that when the husband and wife gave a mortgage on land held by them as tenants by entireties to secure the repayment of money borrowed and used for the improvement of said real estate that the wife was a principal and not the surety of her husband. Appellant insists that under the law, as declared in said cases, the court erred in sustaining the demurrer to the amended complaint. But, in this case, as we have shown, the mortgage was not executed to secure the repayment of the money advanced to Frank Lackey,

Leschen v. Guy.

a member of the appellant association, but to secure the payment of weekly dues, interest, premium, fines, and assessments of said member of the association. In an action against appellee's husband, if he were alive, to foreclose said mortgage, the recovery, if any, would not be for the money advanced on his shares of stock, but for the amount of weekly dues, due and unpaid on his stock, interest, premiums, fines, and assessments.

It is clear from the terms of the mortgage and by-laws, considered in connection with the allegations of the amended complaint, not controlled thereby, that said mortgage as to appellee was a contract of suretyship, and is therefore void, under the provisions of section 6964, Burns' R. S. 1894 (5119, R. S. 1881).

Judgment affirmed.

LESCHEN v. GUY.

[No. 18,079. Filed November 19, 1897.]

BILLS AND NOTES.—*Married Woman.*—*When a Surety.*—Whether or not a married woman is a principal or surety is to be determined, not by the form of the contract, but by the inquiry as to whether she received the consideration for which the obligation was executed. *p. 19.*

SAME.—*Married Woman.*—*Suretyship.*—*Note in Hands of Innocent Holder.*—The fact that a note is payable in bank and has passed into the hands of an innocent holder does not estop a married woman from asserting that she executed the same as surety, and the consequent invalidity of the note as to her. *p. 19.*

From the Daviess Circuit Court. *Affirmed.*

O'Neal & O'Neal, for appellant.

James W. Ogdon, for appellee.

HACKNEY, J.—The appellee, Sarah J. Guy, sued the appellant, Henry Leschen, and others for the cancel-

149	17
150	396
149	17
159	164
149	17
160	528
160	530

Leschen v. Guy.

lation of certain notes and a mortgage, and to quiet the title to certain real estate. The questions here presented arise upon exceptions to conclusions of law stated upon a special finding of facts by the court.

The facts so found were, substantially, that, on the 2d day of August, 1893, said Sarah was a married woman and the wife of William M. Guy; that on said day she and her said husband executed four notes and a mortgage, for the purpose of securing them, to The Jewel Refrigerator Manufacturing Company, payable in bank and, at the same time, as additional security for the payment of said notes, she assigned to said company certain insurance policies and certain building association stock; that the real estate so mortgaged was at that time the separate property of said Sarah. "That in consideration of the execution of said notes and mortgage and of the assignment of said policies and stock, the defendant, The Jewel Refrigerator Manufacturing Company, issued to William M. Guy 25 shares of the capital stock of said company of the face value of \$2,500.00, and this was the sole consideration received for the same; that the plaintiff received no part of the consideration of said notes, mortgage, policies, and stock, but the whole was received by her husband for his use and benefit." Before their maturity the notes and mortgage were sold and assigned by said company to one Tutt, who assigned them to the appellant, neither of said assignees having any knowledge of the equitable or legal defenses to said notes and mortgage, or to whom the consideration therefor had moved. And, after finding the sum due, the court found as a conclusion of law that the appellee should recover as prayed.

Appellant's learned counsel insist that the conclusion stated was erroneous, first, because, as they assert, the purchase of the stock was by Mrs. Guy, and

Leschen v. Guy.

that she was a principal and not a surety; and, second, that she was estopped to assert that her legal obligation was that of a surety.

That part of the finding which we have quoted must support or deny the first of these propositions. It is there found that no part of the consideration passed to Mrs. Guy, but that the only consideration for said notes and mortgage passed to and was received by and to the use and benefit of her husband. The frequently declared test of the relationship sustained by a married woman to such obligations is to inquire whether she received in person or in benefit to her property the consideration for which the obligations are executed. *McCoy v. Barns*, 136 Ind. 378; *Voreis v. Nussbaum*, 131 Ind. 267; *Crisman v. Leonard*, 126 Ind. 202; *Thacker v. Thacker*, 125 Ind. 489; *Nixon v. Whitely, etc., Co.*, 130 Ind. 360; *Security Co. v. Arbuckle*, 119 Ind. 69; *Vogel v. Leichner*, 102 Ind. 55.

Applying this test to the facts found, but one conclusion can be reached, and that is that she was a surety and not a principal.

These cases hold also that the form of the contract does not affect the question. Being but a surety, the contract is voidable, as declared by statute, section 6964, Burns' R. S. 1894 (5119, R. S. 1881), by the above cases and many others.

The fact that the notes were payable in bank, and that they passed into the hands of an innocent holder did not estop the appellee to assert the suretyship and consequent invalidity of said notes as to her. *Voreis v. Nussbaum, supra*; *Potter v. Sheets*, 5 Ind. App. 506; *Cupp v. Campbell*, 103 Ind. 213; *Coats v. Gordon*, 144 Ind. 19.

The lower court did not err in its conclusions of law, and the judgment is affirmed.

Shepard, Receiver, v. The Meridian National Bank *et al.*

SHEPARD, RECEIVER, v. THE MERIDIAN NATIONAL
BANK ET AL.

[No. 17,784. Filed November 23, 1897.]

ABATEMENT OF ACTION.—*Other Action Pending.*—Where two complaints are identical, the relief demanded is the same, and the parties are the same, except in one case the plaintiff is styled receiver, and in the other trustee, the prior will abate the subsequent action.

From the Marion Superior Court. *Reversed.*

Henry N. Spaan and *William A. Ketcham*, for appellant.

A. C. Harris and *Frank Cutter*, for appellee.

HOWARD, C. J.—The complaint in this case is the same as that in the case of *Shepard, Trustee, v. Meridian National Bank*, *post*, 532. Forther reasons given in that case we are of the opinion that the court in this case also erred in sustaining the demurrer to the complaint. We think, as there said, that it has not been satisfactorily shown that appellant, as receiver, had not authority to take possession, not only of funds due John E. Sullivan and not collected by him, but also of all trust funds to which Sullivan was entitled, whether he had collected them or not. As receiver, he was trustee of all assets belonging to Sullivan as clerk; and there does not seem to have been sufficient reason at any time to distinguish between his duties as trustee and his duties as receiver. The appointment was a single appointment, whether the appointee be called a receiver or a trustee, or both.

The appellee bank in this case filed a plea in abatement to the complaint, to which plea a demurrer was sustained; and appellees have assigned this ruling as cross-error, and ask that in case the judgment is reversed this ruling also be reversed. We are of the

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149 539

149 20
170 699

Kerner, Admx., v. The Baltimore and Ohio Southwestern R.W. Co.

opinion that appellees are justified in making this request. The two complaints are identical, the relief demanded is the same in each case, and the parties are the same also, except that the plaintiff in this case is styled receiver instead of trustee. This exception, so far as the facts in the cases are concerned, is a distinction without a difference.

In such a case, as said in *Beach v. Norton*, 8 Conn. 71: "It is but reasonable that the prior suit shall abate the latter." See, also, 1 Ency. Pl. and Prac. 750.

The judgment is reversed, with instructions to overrule the demurrer to the plea in abatement and the demurrer to the complaint, and for further proceedings.

KERNER, ADMINISTRATRIX, v. THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY COMPANY.

[No. 18,094. Filed November 23, 1897.]

MASTER AND SERVANT.—*Personal Injuries.—Fellow Servant.—Vice Principal.*—Where servants of a railroad company were engaged in placing a driving spring in a locomotive, and in doing so one of them, in order to force such spring into the saddle, struck same with a heavy iron, the foreman holding a torch that the blow might fall in the right place, thereby forcing the spring into place with such force as to throw a lever, bar and cold chisel, which were held by other servants in assisting to force the spring in place, and strike and kill one of such servants, the company is not liable, as the participation in the work by the company's foreman was as that of a fellow servant and not as a vice principal.

From the Martin Circuit Court. *Affirmed.*

J. S. Pritchett and Reiley & Emison, for appellant.

W. H. De Wolf, Gardiner & Gardiner and E. W. Strong, for appellee.

HACKNEY, J.—This was an action for damages in the alleged negligent killing of John J. Kerner, a machinist in the employ of the appellee's predecessor,

149	21
150	670
149	21
181	700
149	21
184	514
149	21
186	275
1168	230

Kerner, Admx., v. The Baltimore and Ohio Southwestern R. W. Co.

The Ohio and Mississippi Railway Company. The trial court instructed the jury, upon the close of the appellant's testimony, to return their verdict in favor of the appellee, and that ruling presents the only question for review.

The evidence without conflict establishes the following facts: The decedent and five other machinists were employed in the company's round house, in Washington, in January, 1892, where said decedent had been employed for several years. The machinists, as to the character of the work they should perform from day to day, were directed by one Marion, and on the day in question one of their number, Brenner, was directed by Marion to put into a locomotive a new driving spring, in the place of one broken. Pursuant to said direction, Brenner, with his helper, raised, with jackscrews, the frame of the locomotive, took out the broken spring, set the new one in place, and were endeavoring to pull the equalizer down to key it onto one end of the spring, and were unable to get it down far enough to admit the key into the slot of the equalizer, but had gotten the point of a cold chisel and the sharpened end of a short bar of iron into the slot to secure the equalizer at the point to which it had been drawn. The spring seemed too stiff for the two men to overcome it so far as to admit the key, and Brenner was directed to call other men to his assistance. When he had resumed the effort, Kerner and others, including Marion, participated, and by means of steel hooks placed upon the equalizer, and in the lower end thereof an iron bar was inserted, and constituted a lever upon which the men applied the weight of their bodies. This, though a proper means, was not efficient, and, upon closer inspection, it was discovered that the spring was not down in the saddle by near three-quarters of an inch, whereupon one of the machinists,

Kerner, Admx., v. The Baltimore and Ohio Southwestern R.W. Co.

Von Beren, proposed to strike the spring with a heavy iron and force it into the saddle. This suggestion was followed by the act, Marion holding the torch that the blow might fall at the right point, and the spring was suddenly driven into place with such force as to throw the lever, the short bar, and the cold chisel out of place with violence. One of these struck Kerner upon the head, from the effects of which he died before a physician could be summoned. It appeared that the company had supplied a device, known as a spring puller, the use of which, together with the method of pulling down the equalizer with a lever, were the ordinary methods employed. It appeared also that Kerner had frequently replaced broken springs in locomotives, understood the work, and such work was, in part, that for which he was employed; that such work was constantly required of the machinists in said round house, the company having in use more than sixty locomotives, and such repairs were made daily.

That the act resulting in the injury and death of Kerner was without care for the safety of anyone engaged in the work then in hand is not questioned by counsel, and is without doubt in our minds.

It is insisted by the counsel for appellee that the negligent act was that of a fellow servant of Kerner, and one to which Kerner's negligence contributed. On the other hand, appellant's learned counsel contend that the act was that of a vice principal, Marion, and that it was in violation of the master's duty to supply a safe place to work, and safe machinery and tools with which to perform the work.

Concerning the latter contention, counsel do not advise us wherein the company was negligent, either as to place to work, or the appliances of the service. Very clearly, we think, the negligence was either in the use of appliances, safe when properly used, or in failing to

Kerner, Admx., v. The Baltimore and Ohio Southwestern R.W. Co.

use a safe appliance supplied by the company. The handling and repairing of such heavy machinery as railway locomotives, with tools and appliances suited to the service, involves, at best, many hazards which the employe assumes by his engagement in the service; and it may not be said that the place where such labor is performed is, in a legal sense, dangerous by reason of such hazards. *Bedford Belt R. W. Co. v. Brown*, 142 Ind. 659, and authorities there cited. It would be as difficult to demonstrate that the death of Kerner was in any respect due to the failure to supply proper appliances of the service, or in supplying defective appliances, as to show that the place supplied was dangerous. The plain and unmistakable cause of the injury and death of Kerner was the misuse of appliances, so far as the evidence discloses, proper in every way.

Does the fact that Marion, who held the torch while another struck the spring with the iron, make the company liable on the ground that he was a vice principal? There is some quibbling in the arguments as to whether he was of superior rank to the other machinists because he gave directions as to the character of work each machinist should perform from day to day. There is no room for confusion as to when one is a vice principal, and when a fellow servant. It is not determined by rank in the service or the title by which he is known, but it depends upon the particular service in which he is at the time engaged. If that service is in supplying instrumentalities of the service, or the place to perform the service—in short, if he is performing a duty owing by the master to the injured servant, by authority of the master, and does it negligently, or if he negligently omits a duty of the master which he is delegated to perform, his negligence is that of the master. But if he is engaged with the servant injured

City of Ft. Wayne et al. v. Ft. Wayne and Jackson R. R. Company.

in the common service of the master, not involving some duty of the master, he is a fellow servant. *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, and authorities there cited.

It cannot be that the master, when he has supplied a safe place to work, has furnished tools and appliances free from fault, and when he has not been careless in the employment of unskilful servants, is required also to have present, as each act of each servant is performed, some one to warn the servant against the improper use of the appliances furnished. If he is not so required, then it is clear that Marion's failure to suggest the danger from striking the spring with the heavy iron was not the failure of the company, and his failure was that of a fellow servant.

With this conclusion it is not contended that the appellant was entitled to recover. We might, however, suggest the absence of evidence that the decedent, who was a mechanic of years of experience in the line in which all were then engaged, was free from the same negligence claimed against Marion, namely, in not foreseeing the result of striking the spring.

There is no possible view of the case upon the evidence in the record which would have justified a verdict for the appellant, and the circuit court did not err in directing the verdict.

Judgment affirmed.

THE CITY OF FORT WAYNE ET AL. *v.* THE FORT WAYNE
AND JACKSON RAILROAD COMPANY.

[No. 18,185. Filed November 23, 1897.]

INJUNCTION.—*Condemnation Proceedings.—Notice.—Opening Street.—Statute Construed.*—An injunction will lie to prevent the taking of land by a city for a street, under sections 3623, 3629 *et seq.*, Burns' R. S. 1894, where the owner thereof had no notice of the condemnation proceedings, and was not made a party thereto, notwithstanding

149	25
169	30

City of Ft. Wayne *et al.* v. Ft. Wayne and Jackson R. R. Company.

ing the provisions of sections 3636 and 3644, Burns' R. S., 1894, for assessment and payment of damages which have not been assessed to persons who have had no notice of such proceedings, and providing that no injunction shall lie to restrain such proceedings unless property is sought to be appropriated upon which damages have been assessed and not paid or tendered.

From the Whitley Circuit Court. *Affirmed.*

W. H. Shambaugh and Henry Colerick, for appellants.

John Morris, Robert C. Bell, James M. Barrett and Samuel L. Morris, for appellee.

HACKNEY, J.—The appellee sought and obtained, in the lower court, an injunction denying the right of the appellants, the city of Fort Wayne and her officers, to extend Fourth street in said city across the switch yards and tracks of the appellee, The Fort Wayne and Jackson Railroad Company. The city had, by proceedings under sections 3623, 3629 *et seq.*, Burns' R. S. 1894, established the extension and, at the time of the filing of this suit, was about to open the street across the appellee's right of way, switch yards, and tracks, and was engaged in removing buildings, filling approaches, and constructing said street, but in said proceedings she had wholly failed to give the appellee any notice thereof, and appellee was not a party to, was not named in, and was not present or represented at or in any of said proceedings; nor was any question of the appellee's damages considered in said proceeding, and no damages were assessed, paid or tendered to the appellee, although the proposed extension would result in damage to the appellee in the sum of many thousands of dollars, in the taking of its property and the loss of its uses.

On behalf of the appellants, it is insisted that the statute, section 3636, Burns' R. S. 1894, afforded a legal remedy to the appellee, and that, therefore,

City of Ft. Wayne *et al.* v. Ft. Wayne and Jackson R. R. Company.

equity would not extend its remedy of injunction, and, it is further insisted, that section 3644, Burns' R. S. 1894, expressly denied the right of injunction. For the appellee, it is contended that the absence of notice rendered the proceedings void, and that the taking of the property was properly enjoined.

It is a rule of the constitution that "property shall not be taken by law without just compensation; nor, except in case of the state, without such compensation first assessed and tendered." Section 66, Burns' R. S. 1894. The statute under which the condemnation in question was sought does not obviate this constitutional guaranty, but prescribes a method of compliance therewith.

The federal constitution requires that the property of the individual shall not be taken without due process of law, and notice, under this requirement, is essential. The statute under consideration provides for a compliance with this requirement.

In construing the statute, therefore, we must read it as if these constitutional provisions were a part of it, and as if it did not narrow, but fully supplied these constitutional guaranties.

It is not denied, and without doubt could not be, that in the absence of sections 3636 and 3644, *supra*, injunction would lie to stay the opening of the street across the yards. Section 3636, *supra*, provides that "Upon the application of persons whose lands or property shall have been assessed, but who have not had notice (which they must affirmatively show), the city clerk shall notify said commissioners, who shall meet upon their own motion, hear and determine the claims of such persons (to whom five days' notice shall be given), and report to the council. In case they are entitled to damages which have not been assessed, the same shall be paid out of the city treasury; * * *"

City of Ft. Wayne *et al.* v. Ft. Wayne and Jackson R. R. Company.

Section 3644, *supra*, provides that "If the commissioners make a report to the common council, as herein provided, no injunction shall lie to restrain proceedings, unless the common council shall proceed to appropriate property upon which damages have been assessed, without first causing the same to be paid or tendered; but all other questions shall be raised and tried by appeal in cases where damages have been assessed, paid or tendered."

By the first of these provisions a remedy is given to one whose property has been assessed, but who has not been notified. This provision is upon the one element of damages, and affords no hearing with reference to the condemnation. While the hearing may not avail to defeat the condemnation, because the city may have a discretion in the matter of condemnation which is not subject to review, it must, nevertheless, be true that the property of the citizen may not be condemned for a public use without due process of law.

In Elliott on Roads and Streets, p. 232, it is said that "It is essential that persons who have interests directly affected by proceedings in highway cases should, in some appropriate method, be made parties to the proceedings. Where there are substantial rights in property the owners of those rights should, in accordance with a fundamental principle underlying all proceedings of a judicial character, have their 'day in court.' This can only be accomplished by making them parties to the proceedings. It is difficult to perceive how a person can be justly said to have his 'day in court,' unless he is in some way made a party to the proceeding instituted for the purpose of taking his property from him, or of laying a burden upon it," etc. Again, on p. 233, the author says: "A proceeding to establish a highway, and to appropriate property for that purpose, cannot be justly considered an *ex parte*

City of Ft. Wayne *et al.* v. Ft. Wayne and Jackson R R. Company.

proceeding * * * *. In truth, a statute attempting to make such a proceeding an *ex parte* one would be in conflict with the constitution, for the reason that, in an *ex parte* proceeding, there can be no due process of law within the meaning of the constitution. * * * * It is, indeed, not within the power of the legislature to deprive one who has an estate in real property of the right to contest the effort to take it from him or burden it with a lien, no matter by whom the effort is made."

It must, therefore, be true that, if the above quoted part of section 3636 afforded a remedy on the question of assessment of damages, it could not be enlarged so as to include a hearing upon the question of the taking of the property. However, we think it may be safely said, that, upon the strict construction which should be applied to all statutes in derogation of common right, each of the sections of the statute quoted applies only to the cases of those whose lands "have been assessed." While it appears that damages, growing out of the extension of the street, were assessed in favor of a lessee of the appellee, it cannot be held that, as to the appellee, damages were assessed, when it was not a party to the proceeding by name, by appearance or by notice, and its rights were not considered or determined.

We think it evident, when the statute is read in the light of the constitutional guaranties mentioned, that the legislature did not intend to condemn lands for public use without the owner of such lands having some notice of the proposed condemnation, and without considering the damages and benefits, if any, to such owner. Upon the question of damages it was intended that when the proceedings had included such lands, and assessments had been made, but from inadvertence, the owner had not been notified of the proceedings, he might obtain a hearing without disturb-

Putt et al. v. Putt et al.

ing the assessments as to others. But it was certainly not contemplated that one in no sense a party to the proceedings, and whose interests had never been considered, should be obliged, in order to secure a hearing upon the question of damages, to enter his appearance to the proceedings, limit his rights to the question of damages and thereby waive his rights upon the question of condemnation. If damages had never been considered none could be tendered or paid, and the fair inference from the language of section 3644 is that injunction will lie in such a case.

We, of course, decide nothing with reference to the kind of notice necessary in such cases, and intend no decision upon the general subject of the sufficiency of notice. Here there was no notice, and some notice was required. We conclude, therefore, that the injunction was properly granted. This question, affecting the jurisdiction of the city, rendered its proceedings, as to the appellee, void from the beginning, and other questions, upon the merits of the controversy, are not considered.

The judgment is affirmed.

PUTT ET AL. v. PUTT ET AL.

[No. 18,146. Filed November 23, 1897.]

WILLS.—Contest by Cross-Complaint.—Cross-Complainant Not Required to File Bond.—Where suit is brought to quiet title to real estate, the defendant may defend such action by cross-complaint, setting up the invalidity of the will upon which plaintiff bases his title to such real estate, and thereby contest the validity of such will without filing a bond as provided by section 2767, Burns' R. S. 1894 (2597, R. S. 1881), regulating the contest of wills. *pp. 34-36.*

SAME.—Contest.—Practice.—Harmless Error.—Where a will is set aside on the grounds of mental incapacity of testator and undue influence, such judgment will not be reversed on account of error of the court in its rulings in respect to the issue of unsoundness of mind alone, where the verdict and finding were sufficient to support

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Putt et al. v. Putt et al.

the judgment on either of such grounds of contest independently of the other. *pp. 36-39.*

From the Noble Circuit Court. *Affirmed.*

H. C. Peterson and *H. G. Zimmerman*, for appellants.

R. P. Barr, *T. A. Redmond* and *L. H. Wrigley*, for appellees.

JORDAN, J.—On June 30, 1894, Levi Putt died at Noble county, Indiana, the owner of lands involved in this action, leaving surviving him his wife and five children. Prior to his death he executed the will in controversy, whereby he devised to his wife certain parts of his lands for life, with a proviso that his three daughters and Corwin Putt, his son, take what remained of said property at her death. The residue of his property, real and personal, he gave to his two sons, Charles F. and Corwin Putt, with the provision that they pay to Martha Putt, his wife, a thousand dollars for the benefit of their three sisters. Under the terms of this will Corwin was to pay to his brother, Charles F., the sum of five hundred dollars, and it was further stipulated that said Charles F. and Corwin were to pay all legal claims existing against the testator at the date of his death. Charles F. was nominated as the executor of the will, and on July 9, 1894, the will was probated in the Noble Circuit Court, and letters were issued to him as executor. The widow refused to accept the provisions made for her by the will, and elected to take under the law. On January 22, 1895, Charles F. Putt commenced this action for partition of the lands devised to him by said will, and to quiet his title thereto, making the appellees herein party defendants. Said plaintiff charged in his complaint that all of the appellees, except Martha and Corwin Putt, claimed some title and interest in the

lands which he sought to have partitioned, adverse to him, which claim it was alleged was without right and unfounded, and a cloud upon the plaintiff's right and title in and to the real estate described in the complaint, and he asked that his title to the same be quieted as against such defendants, and that he, Martha, and Corwin Putt, be adjudged the sole owners of all of said lands, and that partition be made among them as such owners. The defendants all appeared and answered this complaint by a general denial. The defendants, Flora Putt, Ida Emert, and Cassie Tegtmeyer, filed a cross-complaint in two paragraphs making Charles F. Putt, in his own person, and also as the executor of the will of Levi Putt, and his wife, Jennie Putt, together with their co-defendants, Martha, Corwin, and Clara Putt, Martin Tegtmeyer, and John Emert, parties defendant to the cross-complaint. The second paragraph of this complaint is the one upon which the judgment in this cause is based. After averring the death of Levi Putt, as heretofore stated, among other facts, it alleges that Charles F., Corwin, and the cross-complainants are the surviving children of said Levi Putt, and that these children and the widow, Martha Putt, are the only heirs of said Levi. It is alleged at the time of his death that he was the owner of real estate of the value of \$10,000.00, and personal property worth \$1,000.00. The execution of a pretended will by Levi Putt and the probate thereof, and the respective interests of the widow and said children as the heirs at law of Levi Putt, have and hold, as tenants in common, in the lands described in both the complaint and the cross-complaint, are all averred and set forth.

The paragraph then charges that this pretended will is invalid upon two grounds: First, that said Levi Putt, at the time of its execution, was of unsound

Putt et al. v. Putt et al.

mind; second, that the will was unduly executed. Other facts are alleged showing that the titles of the plaintiffs, Charles F. Putt and Corwin Putt, in and to the lands mentioned in their complaint, are based on said will, and that such titles and claims are false and unfounded, and cast a cloud upon the title of the cross-complainants to said real estate, etc., and the prayer is that the said pretended will be declared invalid, and the probate thereof be set aside, and that the title to the respective interests of the cross-complainants, as the heirs of Levi Putt in the lands, be quieted against all the defendants to the cross-complaint, and for partition thereof, and all other proper relief. This cross-complaint was verified by the affidavit of the cross-complainants. Charles F. Putt moved the court to dismiss the cross-complaint for the reason that no bond had been filed, as provided by the statute relative to the contest of wills. This motion was overruled, and he excepted. All of the defendants, including the plaintiff, Charles F. Putt, in his own person and as executor of the will, filed a general denial to the cross-complaint, and the cause was put at issue between the parties on their respective pleadings. On a trial before a jury, a general verdict was returned, finding in favor of the cross-complainants on the second paragraph of their complaint, that the will in controversy was invalid, and that the same and the probate thereof should be set aside, and that said cross-complainants and Charles F. Putt and the other defendants to the cross-complaint, were the owners in fee of the real estate in question in the undivided moieties as averred. The jury also returned, with their verdict, answers to a series of interrogatories submitted to them by the court at the request of the appellant. Over a motion for a new trial, the court ren-

Putt et al. v. Putt et al.

dered its judgment declaring the will null and void, and that the same and the probate thereof be set aside, and awarded partition of the lands in accordance with the verdict of the jury, and quieted the title of the cross-complainants, and adjudged that they recover their costs, etc. Partition was made as ordered and finally confirmed by the court.

The errors relied on for a reversal of the judgment are based on the court's overruling the motion to require the cross-complainants below to give bond, as heretofore mentioned, and in overruling the motion for a new trial.

It is first insisted by counsel for the appellant that the court should have required the cross-complainants to give the bond provided by section 2767, Burns' R. S. 1894 (2597, R. S. 1881), in regard to contests of wills. This question is decided adversely to the contention of appellants in *Mason v. Roll, Exr.*, 130 Ind. 260. In the case cited, the executor of the will instituted an action against the children and heirs of the testator to quiet title to certain lands, which the will directed him, as executor, to sell. The defendants in that cause, as in this, appeared and answered the complaint by a denial, and also filed a cross-complaint whereby they assailed the will through which the plaintiff claimed his right to quiet title to the lands, on the grounds that the testator at the time of its execution was of unsound mind, and that it was unduly executed. The court, on motion, struck the cross-complaint from the files, for the reason that no bond was filed as required by the statute in question. On appeal, it was held that in this the lower court erred, and the judgment was reversed. The court, in its opinion, said: "We are of the opinion that the provision of the act (section 2596) regulating the contest of wills, which requires the complaint, or 'allegation

in writing,' as it is called, setting forth the grounds of the contest, to be verified, and a bond to be filed by the contestant, conditioned for the due prosecution of the action and payment of costs, is applicable only to cases where the contestant is the moving party; and that when an heir is, without his consent, brought into a court of equity by the executor of the will of his ancestor, or some other adversely interested party, and compelled either to contest the will in that action or permit its validity to be finally adjudicated against him, he may avail himself of all the defenses open to a defendant in a suit in equity, including the right to file a cross-action, bringing all parties in interest before the court, and contesting the will, just as he could have done had the statute never been enacted. In other words, that where an action of this kind is brought by an executor, it is a suit in equity, and may be defended as such without regard to our statute providing for the contest of wills."

The appellant in the case at bar, by his complaint below, expressly tendered to the defendants an issue of title to the lands which he seems to have claimed under his father's will, and thereby challenged them each and all, to assert and set up any legal or equitable defense, or claim of title, to the real estate adverse to his alleged claim, and had they failed to do so, they would have been thereafter forever barred by the judgment rendered in the action. *Faught v. Faught*, 98 Ind. 470; *Reed v. Kalfsbeck*, 147 Ind. 148; *Finley v. Cathcart*, *post*, 470.

These appellees having been by the complaint challenged to assert the interest which they claimed in the lands described in the complaint, and also to break down, if they could, the will, which was the foundation of the plaintiff's title, had the right, as they did, to respond to such challenge and expose the

Putt et al. v. Putt et al.

invalidity of such instrument by a cross-complaint and ask for affirmative relief thereunder, without regard to the provisions of the section of the statute requiring a bond upon the part of a contestant of a will. We, however, must not be understood by this decision, as holding that persons, after the expiration of three years from the probate of a will, may assail its validity by a cross-complaint, or in any other manner. It would seem to be the legislative will, as expressed by section 2766, Burns' R. S. 1894 (2596, R. S. 1881), to limit the right to attack the validity of a will, to three years after the probate thereof, subject to the exceptions mentioned in section 2771, Burns' R. S. 1894 (2601, R. S. 1881). This right ought not to be extended by judicial decisions so as to permit persons, not within the exceptions provided, to assail its validity, by a cross-complaint or otherwise, after the expiration of the three years from the time of probate. The court, under the circumstances, did not err in overruling the motion in controversy.

The other alleged erroneous rulings of the trial court discussed and urged upon us for reversal by the learned counsel for appellants, and which in any manner would even tend to show available error, have relation wholly to the first ground of invalidity alleged against the will, being that of mental incapacity of the testator, at the time of its execution. These arise out of the refusal of the court, at the request of the appellants, to submit to the jury certain interrogatories. The facts therein embraced, and to which appellants desired answers returned, related alone to the degree of mental capacity required under the law to make a valid will.

Also, the giving by the court to the jury of certain instructions, and its refusal to give others as requested by the appellants. All of such instructions

refer alone to the issue of the unsoundness of mind of Levi Putt, and can have no bearing on the other issue of undue influence as involved in the action. If these rulings were conceded to be erroneous, we cannot say, in the absence of the evidence, that they exerted any influence over the jury in its determination of the issue of undue influence. The evidence is not before us, and counsel for appellants seek to present the questions arising on the instructions in dispute under rule thirty of this court. The learned counsel for appellees insist that if it were admitted that the court did err in its rulings in respect to the issue or subject of unsoundness of mind, that such errors were harmless, and will not secure a reversal, for the reason that the record affirmatively discloses that the jury found in favor of the appellees upon the issue of the undue execution of the will, and that this finding fully sustains the judgment, independently of the finding upon the other issue.

Among the interrogatories submitted at the request of the appellants are the following, with the answers of the jury thereto: "21. Was the testator, Levi Putt, at the time of signing, executing, and acknowledging the will in suit, under any insane delusion? Ans. Yes. 22. If you shall find that the testator, Levi Putt, was, at the time of signing, executing, and acknowledging the will in suit, subject to any insane delusion or delusions, what were they. Ans. He was under the insane delusion that his wife and daughters were persecuting him when they were not. 23. If you shall find that the testator, Levi Putt, was, at the time of the signing, executing, and acknowledging the will in suit, subject to any insane delusion or delusions, did such insane delusion actually enter into or affect the will in any of its provisions or cause its execution? Ans. Yes. 24. Was not the said testator, Levi Putt,

Putt et al. v. Putt et al.

at the time of the execution of said will, a person of sound mind and capable of executing the same? Ans. No. 25. Was the testator, Levi Putt, at the time of the execution of said will, under any undue influence causing him to execute the same differently from what he otherwise would; and if so, in what manner and by whom was the same exercised over him? Ans. Yes, by his son, Charles Putt, by his controlling influence over him as shown by his being able to control him at all times and in all matters pertaining to business, or otherwise."

The general verdict of the jury, finding in favor of the appellees on the second paragraph of their cross-complaint, was sufficient to support the judgment on both or either one of the grounds of contest in issue in the case. By the interrogatory last set out, and the answer returned thereto, it is affirmatively shown, we think, that the jury found by their general verdict that the issue of undue influence was sustained. The question is not, as to whether the special finding, under the interrogatory in question, is alone a sufficient finding of the ultimate fact of the undue execution of the will, but the inquiry is, will it suffice to disclose that the general verdict included a finding on the issue of such influence in favor of the appellees? This question, in the light of the interrogatory in controversy, must be answered in the affirmative. This fact being positively established, it follows that the will was the offspring of undue influence, and the judgment of the court declaring it invalid, and setting the same aside, was a correct result. The judgment then resting, as it does, upon a sufficient foundation, independently of any finding on the issue or subject of mental incapacity of the testator at the time of the alleged execution of the will in suit, the latter, so far as it affects the result of this appeal, under the cir-

cumstances, may be eliminated from the case, and the alleged intermediate errors of the trial court on the questions relating alone to this issue, and which do not appear to have any bearing or effect upon the jury in reaching the result which they did on the second cause of alleged invalidity, may also be dismissed without consideration, for, even though such rulings of the court be conceded to be erroneous, they could not serve to operate in reversing the judgment. See Elliott's App. Proced., sections 592, 593, 632, 633, and 653; *Harter v. Eltzroth*, 111 Ind. 159. It is held in *Moore v. Lynn*, 79 Ind. 299, that an erroneous instruction will not serve to reverse a judgment where the answer of the jury to an interrogatory shows that the complaining party was not injured thereby. See, also, *Manning v. Gasharie*, 27 Ind. 399; *Uhl v. Harvey*, 78 Ind. 26; *Trentman v. Wiley*, 85 Ind. 33.

In *Minor v. Lumpkin* (Texas), 29 S. W. 799, it is held, where it appears that a judgment is based on two grounds, or findings, either of which, independently of the other, is sufficient to support the judgment, it will not be reversed because the court erred, relative to one of such findings. In the case of *In re Fenton's Will*, 97 Ia. 192, 66 N. W. 99, the probate of a will was contested on two grounds, first, mental incapacity; second, undue influence. The jury found in favor of the contestants on both. It was insisted in that appeal that the finding on the second was not supported by the evidence. The court, in course of its opinion, said: "If the finding as to either has support, the cause could not be reversed on the evidence. * * * It is sufficient for us to say that we are so well satisfied with the evidence to support the finding that Mrs. Fenton was not of sufficient mental capacity to make a will, that we need not consider the other question."

The same doctrine is supported by the following

Putt et al. v. Putt et al.

cases: *In re Spencer*, 96 Cal. 448; *Roberts v. Ball* (Cal.), 38 Pac. 949.

Complaint is made of certain questions propounded by the appellees to Doctor William Raby, on cross-examination. This witness was called and examined by the appellant on the subject of the testator's insanity, and the evidence sought to be obtained by the cross-examination, was on the same subject. The record, however, does not show that the witness responded to the questions in controversy, as propounded to him, or gave any evidence which was in any manner prejudicial to the appellant on any issue in the case.

It appearing that the judgment is amply supported and warranted by the finding upon the ground of undue influence, and is not in any way impressed with the alleged erroneous rulings of the court, it is therefore affirmed.

DISSENTING OPINION.

HACKNEY, J.—I do not concur in the holding that a will may be contested upon a cross-complaint, in an action to quiet title, without the statutory bond. The holding that the statutory condition as to the time of waging a contest applies while that of the filing of a bond does not apply seems to me to be inconsistent. The right to contest is purely statutory, and, as has often been held, can only be waged by complying with the conditions upon which the right is given. These holdings may not be obviated and the statute evaded by waging the contest by cross-complaint instead of complaint, and without compliance with the conditions as to time and bond.

Clark v. Marlow et al.

CLARK v. MARLOW ET AL.

[No. 18,260. Filed November 23, 1897.]

WILLS.—Construction.—Support and Maintenance of Beneficiary.—Where by the terms of a will all of the income and rents of certain real estate therein devised are reserved for the support of a person named, and the executor is given the power to sell certain portions of such estate and apply the proceeds thereof to his support, at the death of such beneficiary a claim for his support, maintenance and funeral expenses is a charge and lien on the real estate so devised. *pp. 41-43,*

COMPLAINT.—Wills.—Support and Maintenance.—Demand.—A complaint seeking a judgment for the support and maintenance and funeral expenses of a person against real estate devised, charged with the support of such person, need not allege a demand of defendants for such claim, nor a demand by decedent during his lifetime for the expenses of his support. *pp. 43, 44*

WILLS.—Support and Maintenance.—Subrogation.—Where by the terms of a will the support and maintenance of a person named is made a charge against real estate therein devised, at the death of such beneficiary one holding a claim for his support and maintenance and for funeral expenses may be subrogated to his rights under the will. *pp. 44-46.*

From the Decatur Circuit Court. *Reversed.*

J. K. Ewing, J. D. Wallingford and C. H. Ewing,
for appellant.

B. F. Bennett and Thomas E. Davidson, for appellees.

MCCABE, J.—The appellant sued the appellees to recover a judgment for \$457.00, and to enforce a lien upon real estate to pay such judgment. The circuit court sustained a demurrer to the complaint for want of sufficient facts to constitute a cause of action, and, the plaintiff declining to amend or plead further, the trial court rendered judgment that plaintiff take nothing by her suit. The ruling upon the demurrer is assigned as the only error complained of.

The substance of the complaint is that the defend-

Clark v. Marlow et al.

ants, Lillie May Marlow and Lizzie Marlow, are the owners in fee simple of the following real estate, in Decatur county, namely, lots 44, 45, 46, 47, 48, and 49 in the original plat of the town of Adams, Indiana; also fifteen acres of land in the northeast corner of the farm of which Lucinda Chambers died seized, which lies between the road and Clifty Creek, described as the fifteen-acre tract excepted in the will of Lucinda Chambers, deceased, from the following tract devised by her, viz.: Beginning, etc., describing the same by metes and bounds. That Lucinda Chambers, by her last will, executed on January 20, 1891, and afterwards admitted to probate, devised said real estate in fee simple to the defendants, Lillie and Lizzie Marlow, charged with the support, maintenance, and burial expenses of one George W. Marlow, their uncle. That the estate of said Lucinda Chambers has been finally settled. That said defendants, Lillie and Lizzie, have accepted said legacy in person, and by their guardian. That said George W. Marlow died without leaving any estate, real or personal, and has no administrator or effects to administer upon. That at the time of his death said George W. was indebted to her in the sum of \$450.00 for ninety weeks board, including last sickness, furnished at the instance and request of said George W., who was then destitute, and in absolute want, a bill of particulars of which board is filed herewith and made a part of said complaint, marked "Exhibit A," together with \$7.00 for funeral carriages and for shaving him. That by the terms of the will of said Lucinda Chambers, said board, nursing, and funeral expenses are made a charge upon said real estate by item three of said will, which reads as follows: "I give and devise to my executor, hereinafter mentioned, during the lifetime of my brother, George W. Marlow, fifteen acres of land,"

Clark v. Marlow et al.

which is then described as it is in the complaint; "and also my residence property in which I now live, during the like period, and I direct that my executor pay to my brother, George W. Marlow, all the income and rents derived from the above described real estate for his support and maintenance, and, if necessary for his complete support, he may sell the Adams property and appropriate the entire proceeds of the sale to his support; and at the death of said George W. Marlow, I give and devise the remainder of the fifteen acres above mentioned to my nieces, Lillie May Marlow and Lizzie Marlow, and I also give, bequeath, and devise to said Lillie May and Lizzie Marlow, at the death of said George W. Marlow, the remainder of the Adams residence property above mentioned, if it remain unsold at the death of said George W. Marlow; and, if it shall have been sold, as to any proceeds remaining after his support has been provided for, and his funeral expenses paid, I direct my executor to pay such balance so remaining to the said Lillie May and Lizzie Marlow." That the sum of \$457.00 is justly due her for the support, maintenance, and burial expenses of the said George W. Marlow, which remains wholly unpaid. Prayer for judgment for \$500.00, and that the same be declared a lien upon said real estate.

It is very clear, from the previous decisions of this court, that the complaint is sufficient to show that the will made the support, maintenance, and funeral expenses of George W. Marlow a charge and a lien upon the real estate devised. *Nash v. Taylor*, 83 Ind. 347, and cases there cited; *Davidson v. Coon*, 125 Ind. 497, and cases there cited.

It is first contended by the appellees' learned counsel, that the complaint is insufficient because it alleges no demand upon the defendants to pay the claim sued for, nor any demand by the decedent in his lifetime for

Clark v. Marlow et al.

the support, etc., furnished. In just such a case, it has been held, that no demand is necessary. *Watt v. Pittman*, 125 Ind. 168. It was there said, on page 172, that: "When the appellant accepted the devise and entered into possession it became his duty to support and educate the appellee, and no demand was required to make that duty complete or its breach actionable."

The principal question involved is whether the appellant, the plaintiff, can be subrogated to the rights of George W. Marlow, deceased, under the terms of the will. It is, in effect, insisted by the appellees, in support of the ruling complained of, that appellant cannot be so subrogated unless George W. Marlow demanded a support from the executor of the Chambers will, and a sale of the real estate by him charged, in order to furnish such support, and that the executor refused to furnish such support or make such sale. But we have seen no such demand was necessary during the continuance in office of the executor, and certainly none was necessary after his discharge. And we have also seen that no such demand would be necessary on the appellees, the beneficiaries in the devise, even if they were adults, and surely no such demand on them could be required on account of their infancy. Counsel for the appellees cite only two cases in support of the ruling below, that the appellant can not be subrogated to the rights of George W. Marlow in his lifetime, namely: *Huffmond v. Bence, Admr.*, 128 Ind. 131, and *Halstead v. Westervelt*, 41 N. J. Eq. 100, 3 Atl. 270.

We have examined the cases, and find our own case not only does not support the contention that appellant cannot be subrogated, but that it is an authority that she can be subrogated to the rights held by George W. Marlow in his lifetime. In that case it appears that Rudisill and wife conveyed to their

Clark v. Marlow et al.

daughter, Surrilda Huffmond, certain real estate in consideration of her having boarded, nursed, waited upon, and taken care of said Rudisill and wife during the two years before, and the further consideration that she agreed to continue to board, nurse, and take proper care of her father and mother during their natural lives, the said grantors, reserving to each the possession and control of said real estate during their natural lives. Rudisill died intestate. A claim of \$100.00 in favor of Bence was filed against the administrator of Rudisill for medical services rendered by him to said Rudisill, which were necessary for the comfort and well-being of said Rudisill, making Mrs. Huffmond and her husband defendants, and stating the following further facts, in addition to those above set out: That said Rudisill held possession of said real estate until his death, when his daughter, Mrs. Huffmond, took possession thereof, and has ever since held possession. That decedent requested his daughter to employ a physician, and she refused to do so, and thereupon he called upon and employed the claimant Bence; that said services so rendered by Bence were necessary to the proper nursing and taking care of said Rudisill, as Mrs. Huffmond had contracted to do; that when said services were so rendered, and at the date of the death of the said Rudisill, he had no other property than that conveyed as aforesaid; and said claimant asks that he have judgment against the estate and Surrilda Huffmond for the amount of his claim, and that the same be declared a lien upon all of said real estate so conveyed to and now owned by Mrs. Huffmond, and that the same be subjected to sale for the payment of said claim. The trial court in that case overruled a demurrer to said complaint, and this court held that there was no error in said ruling. In passing upon that ruling this court

The State v. Kates.

said: "The decedent having the right to call upon claimant to render the services contracted to be performed by the appellant, and which she failed to render, and having a right to collect from her the amount necessarily paid out, and having a lien declared; the appellee, Bence, having performed the services at the request of the decedent, the value of which the decedent had a right to recover, and had a lien securing the same,—the appellee, Bence, has the right in equity to be substituted to the rights of the estate." See the cases there cited.

The New Jersey case is not a very clearly reported one, but, even if it should be against the doctrine laid down in our own case, so long as that case stands and is not overruled, we are required to follow it. Our conclusion, therefore, must be that the complaint stated a good cause of action, and that the trial court erred in sustaining the demurrer thereto. The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

THE STATE v. KATES.

[No. 18,820. Filed Nov. 23, 1897.]

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CRIMINAL LAW.—*Reenactment of Statute Not a Repeal of Statute.*—An amendatory statute, defining an offense and fixing the penalty for violation thereof in substantially the same language as that employed in the statute it amends, is not a repeal but a reenactment of the statute, and does not deprive the State of the right to prosecute for an offense committed before the act became effective.

From the Greene Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *Merrill Moores*,
C. D. Hunt and *W. H. Bridwell*, for State.

Short & Riddle, for appellee.

The State v. Kates.

HOWARD, C. J.—The court quashed an indictment charging that appellee had been guilty of the crime of incest with his stepdaughter. No objection is made to the form or substance of the indictment; but it is contended that since appellee was indicted on February 26, 1897, under section 2076, Burns' R. S. 1894 (1990, R. S. 1881), and since this section of the statute was amended by the legislature March 6, 1897 (Acts 1897, p. 184), it therefore follows that the statute under which he was indicted was impliedly repealed by the amendatory statute, and that on April 26, 1897, when the ruling was made quashing the indictment, there remained no statute under which he could be convicted, and hence that the motion to quash was properly sustained. In other words, it is sought to uphold the ruling of the court by contending that the statute which defined appellee's crime and fixed its punishment was repealed by the amendatory statute which also defines the crime and fixes its punishment.

So much of section 2076, Burns' R. S. 1894 (1990, R. S. 1881), as defined appellee's crime and prescribed the punishment therefor, reads as follows: "If any stepfather shall have sexual intercourse with his stepdaughter, knowing her to be such; * * * he * * shall be deemed guilty of incest, and upon conviction thereof shall be imprisoned in the State prison not less than two nor more than five years, or may be imprisoned in the county jail not less than six nor more than twelve months."

The same provisions, word for word, are found repeated in the amendatory statute of March 6, 1897; and there was, therefore, no instant of time when the words above set out were not the law upon the subject.

The contention of appellee cannot be sustained. It is firmly established, by the decisions of this as well as other courts, that the reenactment of a statute, or

Riley v. The State.

of a provision of a statute, is not a repeal of such statute or provision.

This question was quite fully considered, and the authorities cited and discussed in *Sage v. State*, 127 Ind. 15, also a criminal case. It was there said by Judge Elliott: "Principle forbids the conclusion that an amendatory statute defining an offense in substantially the same language as that employed in the statute it amends, takes away the right of the State to prosecute the offender and requires his unconditional discharge."

The question was again before the court in *Reynolds v. Bowen*, 138 Ind. 434, where the authorities were again reviewed and the same conclusion reached. It was there said, citing *Sutherland*, Stat. Con., sections 133, 134, 156, that "Even if there were an express repeal of the law in question, and at the same time, in the same statute which repealed it, a reenactment of the law repealed, the reenactment would so far neutralize the repeal as to keep the old law in force without interruption." Also citing *Moore v. Township of Kenockee*, 75 Mich. 332, that "Even where the repealing statute only substantially reenacts the law repealed, it is held that inchoate statutory rights accrued under the old law are not defeated." See, further, *Thomas v. Town of Butler*, 139 Ind. 245, at pp. 252, 253; *State v. Hardman*, 16 Ind. App. 357.

Judgment reversed with costs, and cause remanded for further proceedings.

RILEY v. THE STATE.

[No. 18,410. Filed Nov. 23, 1897.]

CRIMINAL LAW.—*Appeal.—Imperfect Record.*—Where the record does not contain the affidavit and information upon which the prosecution of appellant was based, the Supreme Court will not consider an

149	48
151	533
149	48
157	96

Riley v. The State.

alleged error of the trial court in the admission of evidence tending to prove other and different crimes than the one charged.

From the Allen Circuit Court. *Affirmed.*

John H. Aiken, for appellant.

W. A. Ketcham, Merrill Moores and Cassius C. Hadley, for State.

MCCABE, J.—We are informed by a statement, or recital in the transcript, that this was a prosecution against the appellant, based on an affidavit and information filed by the prosecuting attorney, charging the defendant with entering a house to commit a felony, to which he plead not guilty. A trial resulted in a verdict of guilty, and fixing his punishment at ten years' imprisonment in the State prison, and that he be disfranchised for ten years. Final judgment was rendered on the verdict, over appellant's motion for a new trial.

The only errors properly assigned call in question the action of the circuit court in overruling appellant's motion to quash the affidavit and information, and in overruling appellant's motion for a new trial. But the affidavit and information are not in the transcript. However, appellant's counsel have wisely refrained from discussing the ruling overruling the motion to quash. That error, if there was error in the ruling, is waived by failure to point it out in his brief. The only ruling discussed in appellant's brief is the refusal of a new trial.

We learn from appellant's brief that the felony charged in the affidavit and information was larceny. The grounds for the motion for a new trial, urged here for reversal, are the admission of evidence tending to prove other crimes than those charged in the affidavit, as is contended in appellant's brief. We can

Riley v. The State.

only know from the record proper that the admitted evidence tended to prove a different crime, or different crimes, than those charged in the affidavit and information. In the absence of the affidavit and information in the transcript, we cannot know that the evidence admitted was not admissible thereunder, or that it did not tend directly to prove some one or more of the crimes charged in such affidavit and information.

Appeals to this court are tried upon the record, and not the statement of counsel, and by the record decided. Elliott's App. Proced., section 186, and cases there cited. The presumption is in favor of the regularity and legality of the proceedings of the trial court; and before that can be overcome, the appellant must present a transcript of the record affirmatively showing the commission of the error complained of by him. Elliott's App. Proced., sections 291, 292, and authorities there cited; *Campbell v. State*, 148 Ind. 527. We are legally required to presume that the crimes which the evidence objected to tended to prove were charged in the affidavit and information until the contrary is made affirmatively to appear in the record presented to us. This is so because it has often been held that all presumptions are in favor of the action of the trial court until it affirmatively appears by the record that its action was erroneous. *Watson Coal, etc., Co. v. Casteel*, 73 Ind. 296; *Foster v. Ward*, 75 Ind. 594; *Johnson v. Holliday*, 79 Ind. 151, and many other cases to the same effect.

The contrary is not made to appear by the record, and hence no available error is presented, and the judgment must be, and is, affirmed.

Moore, Administrator, v. Gary et al.

MOORE, ADMINISTRATOR, v. GARY ET AL.

[No. 17,883. Filed December 7, 1897.]

149	51
152	363
149	51
152	74

WILLS.—Devise of Real Estate.—Remainder.—The law not only favors the vesting of remainders, but presumes that the words postponing the enjoyment of the estate relate to the beginning of the enjoyment of the remainder, and not to the vesting of such estate. *p. 53.*

SAME.—Devise to One and His Children.—Common Law Rule.—At common law a devise to one and his children carried an estate in joint tenancy when the person named had children living at the time of the devise, but when no such children existed, the term, children, was construed as a word of limitation and as equivalent to issue or heirs of his body, and the parent took an estate tail. *p. 53.*

SAME.—Devise.—Contingent Remainder.—Heirs.—When a devise is to a person and his issue, or to him and the heirs of his body, and is followed by a limitation over in case of his dying without leaving issue at his death, the only effect of these words is to make the remainder contingent on the prescribed event. *p. 54.*

SAME.—Devise.—Remainder.—Statute of 1843.—Under sections 56–74, R. S. 1843, what was an estate tail at common law is declared an estate in fee simple; yet, by express provision of the statute, a remainder may be limited thereon the same as an estate tail at common law. *pp. 55, 56.*

SAME.—Devise.—Remainder.—Construction.—Where real estate is devised in fee, simple to one, with a devise over if the first taker should die without issue living at the time of his death, the words refer to a death without issue during the lifetime of the testator, unless there is an express or an implied intention to the contrary. *p. 56.*

SAME.—Construction.—No word or clause in a will is to be rejected to which a reasonable effect can be given, and that effect must be given to every part of a will if possible. *p. 57.*

From the Ohio Circuit Court. *Reversed.*

J. B. Coles, G. B. Hall and W. W. Williams, for appellant.

J. K. Thompson, D. S. Wilber, J. L. Davis, S. H. Stewart and R. L. Davis, for appellees.

MONKS, J.—It is conceded by both parties to this appeal that the only question for decision depends

Moore, Administrator, v. Gary *et al.*

upon the construction of the sixth and seventh items of the will of Mahlon Brown, deceased. By the third item in his will, said testator devised to his wife, who survived him, all of his real estate during her natural life. Items six and seven, so far as essential to the determination of the questions involved, are as follows: "Sixth. At the death of my wife, or at my decease, if I should survive my said wife, I give, grant, devise, and bequeath all of the remaining portion of my personal property, including money on hand, or outstanding, and all my real estate of every kind and nature whatever, to the said John C. Wells and to his heirs, being his own children, forever. Seventh. I further direct that if said John C. Wells shall die without issue, that is without heirs, being his own children lawfully begotten, living at the time of his death, or if said John C. Wells shall die before my said wife, and she should survive me, then at her death, or if I should survive both my wife and said John C. Wells, then at my death, my estate, or the remaining part thereof, shall be reduced to money by the sale of the real and personal property other than money, and the same, when so reduced to money, shall be divided into three equal parts, and I devise and bestow the same as follows, viz."

Mahlon Brown died in 1849, and the will was probated November 27, 1849. Mrs. Brown, the widow of the testator, died in September or October, 1851. John C. Wells was married January 25, 1851, and died December 21, 1893, without children or their descendants living at the time of his death. He was the father of two children, one born December 3, 1851, and the other born in 1867; both died unmarried in 1872.

Appellant, after the death of John C. Wells, filed an application in the court below for an order to sell the real estate devised to said Wells, as directed in said

Moore, Administrator, v. Gary *et al.*

will, free from all claims of appellees, who claim title thereto under said Wells, and to quiet the title to said real estate as against said appellees. From the final judgment rendered in said proceeding this appeal is prosecuted by appellant.

Appellees claim that John C. Wells took an estate in fee simple under said will, and that the devise over in item seven was void. If the devise over in item seven was valid, this cause is to be reversed, otherwise, to be affirmed.

In this State the law not only favors the vesting of remainders, but also presumes that the words postponing the enjoyment of the estate relate to the beginning of the enjoyment of the remainder, and not to the vesting of such estate. *Moores v. Hare*, 144 Ind. 573, and cases cited. Under this well settled rule, whatever estate John C. Wells took under said will vested at once on the death of the testator.

At common law a devise to one and his children carried an estate in joint tenancy when the person named had children living at the time of the devise, but when no such children existed, the term "children," was construed as a word of limitation and as equivalent to "issue" or "heirs of his body," and the parent took an estate tail. *Wilds Case*, 6 Coke 17; *Hannan v. Osborn*, 4 Paige 336; *Nightingale v. Burrell*, 15 Pick. 104, 114; *Wheatland v. Dodge*, 51 Mass. 502; *Shotts v. Poe*, 47 Md. 513; *Parkman v. Bowdoin*, 1 Sumner 359, 18 Fed. Cas., p. 1213; *Wood v. Baron*, 1 East. 259; *Davie v. Stevens*, 1 Doug. 321; 3 Jarman on Wills (Rand. & T. ed.), 174, 177, 182, 204; 2 Jarman on Wills (6 Am. ed. by Bigelow), 383-390; Schouler on Wills (2d ed.), section 555. This rule of the common law has been held to be in force in this State. *King v. Rea*, 56 Ind. 1, 17; *Biggs v. McCarty*, 86 Ind. 352.

It follows, therefore, that if the words "John C.

Moore, Administrator, v. Gary *et al.*

Wells and his heirs being his own children forever," found in item six, are equivalent to the words "John C. Wells and his children forever," then the estate given to said Wells by item six, considered alone, without regard to item seven, as he had no child or children living at the death of the testator, was an estate tail at common law. If, however, the use of the word children in said cause only had the effect to qualify and restrict the meaning of the word heirs to the heirs or issue of his body, the estate would still be an estate tail. 29 Am. and Eng. Ency. of Law, 434; Hopkins on Real Property, p. 48. Hence, in either event, John C. Wells took an estate under item six of said will which at common law would have been an estate tail.

It is clear, from a consideration of the whole will, that the words "without issue, that is without heirs, being his own children lawfully begotten," in item seven of the will, have the same meaning as if only the words "without issue," or "without heirs of his body," had been used. The only effect of the use of the words "children lawfully begotten" was to qualify and restrict the meaning of the word heirs to the heirs of his body. *Parkman v. Bowdoin*, *supra*; *Haldeman v. Haldeman*, 40 Pa. St. 29; 5 Am. and Eng. Ency. of Law (2d ed.), 1093, 1094, and notes.

When a devise is to a person and his issue, or to him and the heirs of his body, and is followed by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these words is to make the remainder contingent on the prescribed event. These words do not prevent the prior devisee taking an estate tail under it. The result is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a subsequent failure of issue.

2 Jarman on Wills (Bigelow's ed.), top p. 427, *pp. 1283, 1284; 1 Fearne on Rem. (Smith's ed.), note d, pp. 5, 6, also pp. 418-420, and note b, par. 11; 2 Fearne on Rem. (Smith's ed.), pp. 67, 68, sections 192-195; Smith on Ex. Int., pp. 67, 68, sections 192-195; *Taylor v. Taylor*, 63 Pa. St. 481, 485, 486; *Granger v. Granger*, 147 Ind. 95.

It would seem, therefore, that the devise over created a contingent remainder at common law. The question of whether the same was a contingent remainder is not material, however, for the reason that the revised statutes of 1843 concerning real property (sections 56-79, R. S. 1843, pp. 424-427), which was in force at the death of the testator, and when the will was probated, destroyed all distinctions between contingent remainders and executory devises, and also made other radical changes in the common law rules concerning real property. Contingent remainders and executory devises in said statute both come under the denomination of expectant estates. Said sections of the revised statutes of 1843 were taken from the New York revised statutes of 1829, 1 R. S. N. Y. 1829, pp. 722-726. The changes made by said statute in the common law rules concerning real property are pointed out in 4 Kent Comm., pp. 199-300. It is provided by section 56, R. S. 1843, p. 424, that all estates which, according to the common law, would be adjudged to be an estate tail, shall hereafter be adjudged a fee simple; and if no valid remainder shall be limited thereon, shall be a fee simple absolute. Section 57 provides, that "Where a remainder in fee shall be limited upon any estate which would be adjudged a fee tail, according to the law as it existed prior to the abolition of estates tail in this State, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker without issue,

Moore, Administrator, v. Gary et al.

living at the time of such death." Section 73 provides that "Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words, 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as an ancestor." It is also provided (section 74) that "Where a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take the estate, in the same manner as if born before the death of their parent; and any future estate depending on the contingency of the death of any person without heirs, or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent." It will be observed that while under our statute what was an estate tail at common law is declared an estate in fee simple, yet, by express provision of said statute, a remainder may be limited thereon the same as on an estate tail at common law.

It is contended by appellees that under the law as declared by this court in *Fowler v. Duhme*, 143 Ind. 248, and *Moore v. Hare*, *supra*, that said clause of item seven refers to the death of John C. Wells in the lifetime of the testator.

The rule is, that where real estate is devised in fee simple to one, with a devise over, if the first taker should die without issue living at the time of his death, the words refer to a death without issue during the lifetime of the testator, unless there is an express or implied intention to the contrary. *Fowler v. Duhme*, *supra*, and cases cited; *Moore v. Hare*, *supra*, and cases cited; *Harris v. Carpenter*, 109 Ind. 540, 544; *Heilman v. Heilman*, 129 Ind. 59, 64.

It is expressly provided in said item that the devise over was to take effect upon either of the following conditions: (1) If Wells should die without issue liv-

Moore, Administrator, v. Gary *et al.*

ing at the time of his death. (2) If Wells should die before the testator's wife and she should survive the testator. (3) If the testator should survive both Wells and his wife.

In the third condition the words refer to a death of Wells during the lifetime of the testator. In the second condition the words refer to a death of Wells in the lifetime of the widow, if she survive the testator, and this may be during the lifetime of the testator, or after his death. There is but one period during which Wells might die not provided for by conditions two and three, and that is, after the death of both the testator and his widow. It is a canon of interpretation that no word or clause in a will is to be rejected to which a reasonable effect can be given, and that effect must be given to every part of a will if possible. It is clear, we think, that the words in the first clause in said item, being the first condition stated, referred to the death of Wells after the death of both the testator and his widow, because by the two following clauses the testator provided for the death of Wells before the death of the widow, and before the death of the testator.

The words in said item refer, therefore, to the death of Wells after, as well as before, the death of the testator. For this reason the case in hand does not fall within the rule declared in *Fowler v. Duhme, supra*, and cases of that class.

John C. Wells died after the death of the testator, without issue living at the time of his death, and, by the terms of the will, the devise over took effect at that time, and the same is valid.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Gainey *et al.* v. Gilson, Receiver.

GAINNEY ET AL. V. GILSON, RECEIVER.

[No. 18,220. Filed December 7, 1897.]

CORPORATIONS.—*Liability of Stockholders.*—When a stockholder of a corporation has paid the full par value of his stock, his liability is terminated, and in the absence of a statute imposing upon him an additional liability, he cannot be compelled to respond to the corporation nor to its creditors in payment of any debts except in cases where there has been a failure to duly incorporate. . *pp.* 60, 61.

RECEIVERS.—*Action Against Stockholders of a Corporation to Collect Unpaid Assessments.*—*Jurisdiction.*—Where the stockholders of a corporation have failed to pay assessments due from them on their respective shares of the capital stock, a receiver of such corporation may join all the defendants in one action, though they may not all reside in the jurisdiction where the suit is instituted. *pp.* 61–63.

SAME.—*Action Against Stockholders of a Corporation to Collect Unpaid Assessments Must Be Authorized by Court.*—A complaint by a receiver of a corporation against the stockholders to collect unpaid assessments or calls due on their respective shares of stock must allege that the receiver was authorized by the court to institute the action. *p.* 63.

From the Lawrence Circuit Court. *Reversed.*

Martin & Dye, Brooks & Brooks and Gardiner & Gardiner, for appellants.

G. O. Isenminger and Newton Cooke, for appellees.

JORDAN, J.—Appellee, as the receiver of the Bedford Building Stone Company, instituted and prosecuted this action to recover of appellants, stockholders of said company. He recovered a judgment, from which appellants appeal and seek to have the same reversed on account of several alleged errors. The complaint filed by the receiver in this cause, substantially alleges the following facts: That the stone company of which he is receiver was duly organized and incorporated on June 11, 1891, under the laws of this State, and was doing business of mining, quarrying, selling, and shipping stone in Lawrence county, In-

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158 227

149	58
170	425
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Gainey et al. v. Gilson, Receiver.

diana, and had its paternal and principal office located in the city of Bedford, in said county; that the defendants are members and stockholders of said corporation, owning and holding each the shares of stock as therein mentioned and set out; that on October 5, 1894, said company being insolvent, ceased to do business, and was placed in the hands of a receiver. The debts and liabilities due and owing by the said company to divers creditors, are alleged to amount to the sum of \$15,000.00; and it is further averred that on April 15, 1895, under the order of the Lawrence Circuit Court, by which court the plaintiff had been appointed receiver of the concern, and in pursuance of the by-laws of said corporation, he made an assessment and call upon the shares of the capital stock held and owned by the defendants, of nine dollars on each share of the unpaid balance thereof remaining due and unpaid from each of said stockholders, for the purpose of paying the indebtedness of said company, and that he notified, in writing, each of said defendant stockholders of said assessment, and demanded payment thereof, etc. That the defendants are the only remaining solvent stockholders and members of the company, whose stock has not been fully paid. It is further averred that each and all of the defendants have wholly failed and refused to pay to the plaintiff the said assessments due, from each, upon their said shares of stock, and that more than eighteen months have elapsed since the subscriptions were made to said capital stock, and there remains due and unpaid on each share of the stock, belonging to said defendants, the sum of forty dollars. The prayer is that the court make assessments against said stockholders for the payment of said debts, and judgment is demanded for \$15,000.00 to be apportioned as mentioned, among the defendants, and for all other and proper relief.

Gainey et al. v. Gilson, Receiver.

On the trial, the court made a special finding of facts, and stated its conclusions of law thereon, and over the exceptions of the defendants to the conclusions, and over their motion for a new trial, rendered a judgment in favor of the plaintiff for \$10,200.00, which was apportioned by the court among the defendants, as therein ordered. The insistence of counsel for appellants is that the complaint is insufficient in several respects, and they also contend that the action is based on section 5077, Burns' R. S. 1894 (3869, R. S. 1881), and therefore, under the decision of *Wood v. Harrison*, 50 Ind. 480, that the appellants are not liable. It is evident, we think, that counsel are mistaken in their contention that the action is founded on the statute above cited, and therefore, the questions which they seek to present as to its force and effect require no consideration. The purpose or theory of the complaint, as disclosed by its general outlines, is to collect the unpaid assessments or calls due from appellants on their respective shares of the capital stock, for the purpose of being applied by the receiver, as averred, in payment of the debts of the company. The corporation of which appellee is receiver, is said to have been organized under the statutes relative to the incorporation of manufacturing and mining companies. Section 5060, Burns' R. S. 1894 (3859, R. S. 1881), which is a part of that law, requires the capital stock to be paid within eighteen months from the incorporation of the company, and the section next following provides for the collection of calls upon stock assessments by suit, in the event that the same are not paid within thirty days from the time appointed for the payment. The capital stock of a corporation is held to be a trust fund for the payment of its creditors, and when a stockholder has paid the full par value of his stock, his liability is terminated, and in the absence

Gainey *et al.* v. Gilson, Receiver.

of a statute imposing upon him an additional liability, he cannot be compelled to respond to the corporation, nor to its creditors, in payment of any debts or obligations, except in cases where there has been a failure duly to incorporate, whereby the members of the concern may be said to constitute a co-partnership, and become liable as partners for the payment of the debts of the concern. See *Toner v. Fulkerson*, 125 Ind. 224; *Bruner v. Brown*, 139 Ind. 600, and authorities cited; *Coleman v. Coleman*, 78 Ind. 344; *Trippe v. Huncheon*, 82 Ind. 307; *Coffin v. Ransdell*, 110 Ind. 417; *Davis v. Ladoga Creamery Co.*, 128 Ind. 222; *Beach on Private Corporations*, section 555. That a receiver of a corporation, under the authority of the court appointing him, may by an action enforce the common law liability against the delinquent stockholders and collect the amount due and unpaid upon their shares of capital stock, is a right, fully affirmed and settled by the authorities. Of course, in the collection of such subscription he is invested, in this respect, with no greater power than that which the corporation possessed, and is bound precisely in the same manner as it was. *Beach on Private Corp.*, sections 716, 717, and 772; *Beach on Receivers*, sections 669 and 670; *Billings v. Robinson*, 94 N. Y. 415; *Coffin v. Ransdell*, *supra*; *State v. Sullivan*, 120 Ind. 197; *Bruner v. Brown*, *supra*; *Runner v. Dwiggins*, 147 Ind. 238, and authorities cited. It is equally well settled, as a general rule, that a receiver of a corporation, in the absence of some statutory authority, cannot sue to enforce a liability created by statute against stockholders, in favor of creditors, independently of what they owe the corporation on the account of their stock. *Runner v. Dwiggins*, *supra*; *Beach, Private Corp.*, section 716, 717. Without at this point deciding in general as to the sufficiency of the facts as averred in the complaint to entitle the re-

Gainey et al. v. Gilson, Receiver.

ceiver to maintain this action, we may, however, affirm, as a general proposition, over which there can be no contrariety of opinion, his right to enforce the liability of the appellants to pay calls for stock assessments made by him under the order or authority of the court, for the payment of the debts of the corporation, by properly taking the steps which the law requires. It appears that the ten delinquent stockholders, who are defendants in this action, all reside in Lawrence county, where the suit was commenced, except four. The latter appeared, and by pleas in abatement denied the jurisdiction of the Lawrence circuit court over their person, upon the ground that each was, at the time this action was commenced, a *bona fide* resident of Daviess county, Indiana, and owned no stock in the corporation of which the plaintiff was receiver, jointly, or in connection with any other defendant in the suit, and was not interested in any stock in connection with any of the other defendants. Demurrers were sustained to the several pleas in abatement, and these rulings of the court, it is claimed, were erroneous.

It is disclosed by the complaint that all of the defendants were, at the commencement of this action, delinquent upon the common assessments, which applied equally alike to the respective shares held by each. It may be conceded, so far as this suit is concerned, that no one of the defendants was liable to any greater extent than the amount due and unpaid on the share or shares owned and held by him. This amount was the measure of his liability in this action, still each was immediately liable to pay the assessment made upon his part of the capital stock, which the plaintiff sued to collect, and to this extent, at least, he had an interest in the action adverse to the plaintiff; and while the latter, at his option, might have

Gainey *et al.* v. Gilson, Receiver.

prosecuted separately an action against each, nevertheless he was not compelled to institute a multiplicity of suits to recover the stock assessments in controversy, but under the equitable provisions of the code, he had the right to join all the defendants, as he did, in one action, and in the event of a recovery, the court could so mould its judgment or decree as to adapt it to the different liabilities of the defendants, and properly apportion the amount to be paid by each. See section 269, Burns' R. S. 1894 (286, R. S. 1881); section 579, Burns' R. S. 1894 (570, R. S. 1881); *Douglass v. Howland*, 11 Ind. 554; *Overmyer v. Cannon*, 82 Ind. 457. The plaintiff having the right, under the circumstances, to unite all of the defendants in the same action, could therefore commence it in Lawrence county, where a part of them resided, and the jurisdiction of the Lawrence Circuit Court could be extended to those residing in Daviess county, by issuing and serving upon each the proper process. Section 314, Burns' R. S. 1894 (312 R. S. 1881); *Lindley v. Kregelo*, 121 Ind. 176.

The court did not err in sustaining the demurrers to the pleas in abatement.

It is urged by the appellants that the complaint is not sufficient, for the reason that it does not allege that the receiver had leave, or was authorized by the court, to institute this action. There is an entire absence of any averment in the complaint tending to establish this fact. It is the general rule in this State, as settled by repeated decisions of this court, that when a receiver sues, leave or authority to institute the action, from the court appointing him, becomes an essential fact which must be alleged in the complaint, and proved on the trial. *Hatfield v. Cummings, Rec.*, 142 Ind. 350, and authorities there cited. The complaint in this cause is rendered fatally insufficient by its omission to allege that the plaintiff had obtained

The Town of Boswell v. Wakley.

the authority of the court to prosecute this action prior to its commencement. In this respect, at least, the special finding of facts is also deficient, and it may be further said, that we find nothing in the evidence upon this question, except that the plaintiff was appointed receiver in a certain action to foreclose a mortgage against the corporation in the Lawrence Circuit Court, and was authorized, under the order appointing him, to take charge of the mortgaged property, manage and care for the same, until it was sold by the sheriff. The complaint and the special finding of facts may be insufficient in other respects, but as to this we do not decide.

The court, for the reason stated, erred in overruling the demurrer to the complaint, and the judgment is therefore reversed, and the cause is remanded to the lower court, with instructions to grant appellants a new trial, and sustain the demurrers to the complaint.

THE TOWN OF BOSWELL v. WAKLEY.

[No. 18,440. Filed December 8, 1897.]

MUNICIPAL CORPORATIONS.—*Sidewalks.—Negligence.*—A city or incorporated town is liable for the negligence of its officers in the construction or repair of sidewalks. pp. 66, 67.

SPECIAL VERDICT.—*Conclusions of Law.*—Conclusions of law in a special verdict must be disregarded by the court in rendering judgment thereon. p. 69.

SAME.—*Contributory Negligence.*—The findings of a special verdict in an action against a town for an injury received in passing over a board sidewalk which show that plaintiff had frequently passed over such sidewalk and knew that it was old, that the boards were loose and that the sidewalk was dangerous to pass over; that plaintiff passed over same in the night time with his hands in his pockets, with full knowledge that some of the boards were loose and liable to trip a passenger; that he could have safely and conveniently gone home by a different route, and that after receiving the injury there was no evidence that he was actually trying to avoid anticipated danger by reason of said sidewalk being out of repair, fail to

The Town of Boswell v. Wakley.

to establish affirmatively that plaintiff was exercising ordinary care for his own safety when he was injured, and that he was free from contributory fault or negligence. pp. 69-71.

SAME.—*Contributory Negligence.*—A finding in a special verdict in an action against a town for damages for injuries received on a defective sidewalk that plaintiff was walking slowly and carefully will not warrant the legal conclusion that plaintiff was free from contributory fault. pp. 71-74.

From the Newton Circuit Court. *Reversed.*

S. P. Thompson, A. B. McAdams, Frank Foltz, Harrie R. Kurrie and Charles G. Spittler, for appellant.

Daniel Frazer and Will Isham, for appellee.

MCCABE, J.—The appellee sued the appellant to recover damages, which he alleged in his complaint he had sustained through defendant's negligence in suffering one of its plank sidewalks, running east and west, to be and remain out of repair, the same being constructed by nailing inch boards across three stringers lying on the sidewalk lengthwise; that the stringers had become rotten to such an extent that they would not hold nails; that the plank or boards in many places were not fastened at all to said stringers because of the nails rotting off, or else coming loose from the rotten boards and timbers. It is alleged that as plaintiff was passing along and over said sidewalk on the evening of January 26, 1896, about 9 o'clock, the night being dark, one of the unfastened boards had become moved to the north about seven or eight inches from the south stringer, and was resting on but two stringers. That plaintiff stepped on the loose south end of said board, which immediately gave way and let the plaintiff's foot fall down and between said stringers, where the same became fast, and the plaintiff, losing his footing, fell and was thrown violently to the earth, fracturing the bones of his shoulder

The Town of Boswell v. Wakley.

and causing other injuries, without any fault or negligence on the plaintiff's part.

The issues formed were tried by a jury, who returned a special verdict in the form of interrogatories pursuant to the act approved March 11, 1895 (Acts 1895, p. 248). These proceedings took place before that act was repealed. The trial court overruled appellant's motion for judgment in its favor on the special verdict, and sustained the appellee's motion for judgment in his favor upon said special verdict, and overruled the appellant's motion for a new trial. The errors assigned call in question these rulings, and further assign that the complaint does not state facts sufficient to constitute a cause of action.

The amount of the damages assessed, and for which judgment was rendered, was \$740.00; the appeal was properly taken to the Appellate Court. The cause comes into this court on account of one of its judges having rendered the decision in the lower court, thereby being precluded from sitting on the appeal, and the other four judges being equally divided, the cause was, pursuant to the statute, transferred to this court. Section 1358, Burns' R. S. 1894.

The first contention of the appellant is, that the complaint is bad because the recent decisions of this court holding counties not liable for the negligence of its officers in the construction and repair of bridges apply as well to incorporated towns and cities, and in support thereof cites *Board, etc., v. Allman*, 142 Ind. 573. It is contended that this court ought now to overrule the long line of decisions made by it, holding municipalities liable for such negligence as much as it ought to overrule, as it did in that case, a long line of its own decisions holding counties liable for negligence in the construction and repair of bridges. But this court there pointed out a broad distinction

The Town of Boswell v. Wakley.

between the powers and liabilities of municipalities in this respect, and the powers and liabilities of counties. Following the rule indicated in that case, we adhere to the doctrine previously established as to the liabilities of incorporated towns and cities for negligence. Hence we hold the complaint sufficient. *Cones v. Board, etc.*, 137 Ind. 404. As was said in *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 453: "Actionable negligence is made up of three elements, according to our decided cases, all of which must be alleged and proven affirmatively by the plaintiff in order to recover. These elements are first, the defendant's negligence; second, the plaintiff's freedom from fault or negligence in the matter complained of, and third, damage to the plaintiff proximately caused by the defendant's negligence. The failure to establish any one of these elements by the evidence is as fatal to a recovery as the failure to establish each and every one of them. *Ohio, etc., R. W. Co. v. Hill, Admx.*, 117 Ind. 56; *Chicago, etc., R. W. Co. v. Hedges, Admx.*, 118 Ind. 5; *Louisville, etc., R. W. Co. v. Stommel*, 126 Ind. 35; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1; *Pennsylvania Co. v. Meyers, Admx.*, 136 Ind. 242; 16 *Am. and Eng. Ency. of Law*, 388, 389."

It may be conceded that all these elements except that of appellee's freedom from contributory fault or negligence have been established in the facts found in the special verdict. Therefore, it is only necessary to examine so much of the special verdict as relates to this element of the action. It is as follows:

"1. How many times per week did the plaintiff pass over the sidewalk * * * prior to January 26, 1896? Ans. Three or four times a week.

"2. Since the 1st day of September, 1895, has the plaintiff known and believed that said walk was dangerous to pass over? Yes.

The Town of Boswell v. Wakley.

"3. Did plaintiff in fact have actual knowledge prior to January 26, 1896, that said sidewalk was in fact old, that the boards were loose, and that said sidewalk was dangerous to pass in the night time? Yes.

"4. On the night of January 26, 1896, was said sidewalk in fact icy and dangerous to pass over? Yes.

"5. Did the plaintiff, on the night of January 26, 1896, walk over said sidewalk with his hands in his pockets, with full knowledge that some of the boards in said walk were loose and liable to trip a passenger? Yes.

"6. Could the plaintiff have easily, conveniently, and safely, gone home by the way of Main and Adams streets? He might.

"7. Was the plaintiff, at the time of receiving said injury, actually trying to avoid anticipated danger by reason of said sidewalk being old and out of repair? No evidence.

"8. Did the plaintiff in fact fall to the ground without removing his hands from his pockets? Yes.

"9. Was the plaintiff a man of about forty-one years of age, in perfect health and physical vigor, in possession of good eyesight and of all his faculties, about 9 o'clock at night walking carefully and slowly westward along and upon said sidewalk on his way from the church to his home on the left side of his wife, and in company with her? Ans. Yes.

"10. Did * plaintiff * * while walking carefully thereon step with his left foot on the south third of one of said boards which was not nailed or otherwise secured, and so displaced as that the south end thereof had no support, and did not said board give way * * * and said board flying up at the other end catching the right foot of plaintiff and trip him so that he fell to the frozen ground with great violence? Ans. Yes.

The Town of Boswell v. Wakley.

"11. Did the plaintiff wholly, by reason of said condition of said sidewalk and without his fault or negligence, receive a fall and injury to his shoulder on said 26th day of January, 1896? Ans. Yes.

"12. Was plaintiff, at the time he received said injury, and at all times theretofore, without knowledge or notice of said defect? Ans. Yes."

The next interrogatory and answer are to the effect that plaintiff, at or before he received the injury, had no knowledge that said board was loose and not nailed and not resting on said south stringer.

"14. Was the plaintiff without fault when he received this injury? Ans. Yes."

The eleventh and fourteenth interrogatories and answers thereto in so far as they attempt to state that the plaintiff was without fault or negligence, do not state facts, but conclusions of law which do not belong to the province of the jury. They can do nothing but state the facts that have been established by the evidence. Therefore, such conclusions of law must be disregarded in declaring the law arising upon the facts found in the rendition of the judgment thereon. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Conner v. Citizens' Street R. W. Co.*, 105 Ind. 62; *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275; *Louisville, etc., R. W. Co. v. Lynch*, 147 Ind. 165; *Board, etc., v. Bonebrake*, 146 Ind. 311; *Terre Haute, etc., R. R. Co. v. Becker, Admx.*, 146 Ind. 202; *Teegarden v. Lewis*, 145 Ind. 98.

The first, second, and third interrogatories and answers thereto establish as facts no longer in dispute that the plaintiff passed over said sidewalk three or four times a week prior to January 26, 1896, and ever since September 1, 1895, four months prior to his injury, and in fact had actual knowledge that said side-

The Town of Boswell v. Wakley.

walk was in truth old, that the boards were loose, and that said sidewalk was dangerous to pass over in the night time. And by the fourth, that said sidewalk was icy, and by the fifth, that he walked over it on the night of his injury with his hands in his pockets with full knowledge that some of the boards in the sidewalk were loose and liable to trip a passenger. And by the sixth that he could easily, conveniently, and safely have gone home by Main and Adams streets. And by the seventh, that at the time of receiving his injury there was no evidence that he was actually trying to avoid anticipated danger by reason of said sidewalk being out of repair.

If these facts do not show affirmatively that the plaintiff failed to exercise ordinary care for his own safety, and hence guilty of contributory negligence, they are at least sufficient to show a complete failure on his part affirmatively to establish that he was exercising ordinary care for his own safety when he was hurt, and was free from contributory fault or negligence. The burden of establishing affirmatively this indispensable element of his action being, as we have seen, on the plaintiff, the failure so to establish the same is in legal effect a finding that it did not exist. *Fisher, Admr., v. Louisville, etc., R. W. Co.*, 146 Ind. 558, and cases there cited; *Boyer v. Robertson*, 144 Ind. 604, and cases there cited.

But as to plaintiff's knowledge of the condition of the sidewalk, his counsel contend that the verdict shows that he was ignorant thereof. They rely on interrogatories and answers twelve and thirteen. The twelfth finds that he was at the time of, and at all times prior to his injury, without notice or knowledge of the defect. If the jury meant by this that he was ignorant of the defective sidewalk at the time of his injury, then it irresistibly places their understanding

The Town of Boswell v. Wakley.

or their integrity sadly in doubt, because they had already fully and unmistakably found that he knew all about it. But justice to all, as well as fairness to the jury, requires us to harmonize their findings if possible. The next, the thirteenth interrogatory and answer, shows what the jury had reference to by the word "defect," as used in the twelfth. The thirteenth is to the effect that he had no knowledge that the board was loose and not nailed, and not resting on said south stringer. That must be the defect that these two interrogatories were intended by the jury to cover and refer to. But that does not contradict the finding in the others, that he had passed over the sidewalk three or four times a week, and had known that it was old, out of repair, the boards loose and dangerous to walk on, especially after night, for four months before he was injured thereon. It was not necessary that the finding should show that he knew that that particular board was loose. It was enough that it appears from the verdict that appellee knew of the general condition of the sidewalk, it making no difference that he was ignorant of the fact that the particular board causing his injury was loose or in a defective condition. So the finding shows his knowledge of the defect was complete.

But appellee's counsel contend that findings nine and ten show that the plaintiff was walking carefully and slowly on the sidewalk when he was thrown down and injured, and hence there is an affirmative finding that he was free from contributory negligence. If the court could say, as matter of law, that a man who walks carefully and slowly into or upon a place of danger, as the jury had previously found this was, would be free from contributory fault, there might be some plausible ground for the contention. But there is no such law. The plaintiff was required to establish

The Town of Boswell v. Wakley.

affirmatively such a state of facts as show that the court would be authorized to conclude therefrom, as a matter of law, that he was free from contributory fault or negligence. To establish that he was walking slowly and carefully does not establish that he was acting with ordinary care for his own safety. But if we were to hold that walking slowly and carefully meant that he was acting with ordinary care for his own safety, we should bring those findings into irreconcilable contradiction of the seventh finding, which is, that plaintiff, at the time of receiving said injury, was not actually trying to avoid anticipated danger by reason of said sidewalk being old and out of repair. If, with full knowledge of the danger, already shown, and it anticipated, he was not actually trying to avoid it, he certainly could not be acting with ordinary care for his own safety. Therefore, when the jury found he was walking slowly and carefully, they did not mean to find that he was exercising ordinary care for his own safety. To hold otherwise would seriously impeach either the integrity or the comprehension of the jury.

Therefore, there is a total failure to find that any degree of care was used by the plaintiff to avoid danger in passing over the walk at the time he was injured. The case of *City of Bedford v. Neal*, 143 Ind. 425, is very much like the case now before us. It was there said, at page 428, that: "There is no evidence to show what degree of care she used to avoid danger in passing over the walk at the time she was injured. It is not enough for the plaintiff in such cases to prove the negligence of the defendant. The plaintiff must also prove that his own negligence or want of ordinary care did not contribute to bring about his own injury. *City of Plymouth v. Milner*, 117 Ind. 324. It is true it is the duty of a city to keep the streets and side-

The Town of Boswell v. Wakley.

walks thereof in a reasonably safe condition for travel. * * * But that duty and obligation does not absolve the plaintiff from the duty and obligation to exercise ordinary care for his own safety. * * * As before stated, the appellee knew all about the defect in the sidewalk when she ventured upon it the last time in the dark, whereby she received her fall and injury. It is true that it is settled law in this court, that because one has knowledge that a highway or sidewalk is out of repair, or even dangerous, he is not therefore bound to forego travel upon such highway or sidewalk *City of Huntington v. Breen*, 77 Ind. 29; *Wilson v. Trafalgar, etc., Grav. R. Co.*, 83 Ind. 326; *Wilson v. Trafalgar, etc., Grav. R. Co.*, 93 Ind. 287; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *City of South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792; *Town of Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Turner v. Buchanan*, 82 Ind. 147, 42 Am. Rep. 485.

“But the doctrine to be extracted from these cases is that a person with knowledge of the defect or danger must, in attempting to pass, exercise care proportioned to the known danger to avoid injury. And as a consequence, the appellee in the case before us having knowledge of the defective and unsafe condition of the sidewalk when she entered upon it the last time in the dark, she was required to exercise more care than she would have been required to exercise had she been ignorant of the defect, or there had been no defect and it had been daylight. * * * It is true the appellee was only required to exercise ordinary care under the circumstances to exculpate her from the charge of contributory negligence. * * * Ordinary care, however, is a relative term. What would be ordinary care under one set of circumstances might be gross negligence under a different set of circum-

 Boyer v. Robertson et al.

stances. Therefore, what would constitute ordinary care to avoid injury in passing over a defective and unsafe sidewalk in the dark by one ignorant of its defective and unsafe condition would not constitute ordinary care in one thus passing who had knowledge of its defective and unsafe condition. There is not a particle of evidence that the appellee used any care to avoid the accident or harm to herself. Nor is there any evidence that she used her knowledge of the defective or unsafe condition of the sidewalk to avoid injury to herself. There was, therefore, a total lack of evidence to establish one of the indispensable elements of the plaintiff's cause of action."

The above language is exactly applicable to the special verdict in this case, and hence the court erred in sustaining the plaintiff's motion for judgment in his favor on the special verdict.

The judgment is reversed, and the cause remanded, with instructions to sustain the appellant's motion for judgment in its favor, and render judgment accordingly.

 BOYER v. ROBERTSON ET AL.

[No. 18,041. Filed Nov. 2, 1897. Rehearing denied Dec. 8, 1897.]

149 74
149 394

EJECTMENT.—Description of Real Estate.—A judgment for plaintiff will be set aside in an action in ejectment involving the title of the real estate, where neither the complaint nor findings of the jury supply facts sufficient from which a judgment could be rendered containing a sufficient description of the real estate. *pp. 75, 76.*

SAME.—Jurisdiction.—Collateral Attack.—Where in an action in ejectment by one claiming title through an administrator against an heir of decedent, a finding by the court that notice of the pendency of the petition to sell was published, and found by the court to be sufficient, although it is not found that such heir was named as defendant, and as such included in the service of process or publication, sufficiently shows jurisdiction over the person of defendant in such suit for the purposes of the suit in ejectment. *pp. 76, 77.*

Boyer v. Robertson et al.

From the Carroll Circuit Court. *Reversed.*

L. D. Boyd and E. E. Pruitt, for appellant.

HACKNEY, J.—This was an action in ejectment by the appellees, the alleged owners as tenants by entirety, against the appellant for the possession, with damages, of lots eleven and twelve in the town of Carrollton, and a tract described as “A part of the east half of the southeast quarter of section fifteen, in township twenty-four north, of range one east, commencing twelve feet west of the northwest corner of lot number four in the town of Carrollton, Carroll county, Indiana, due west to the west line of said lot of land, and to include all the land heretofore owned by one Henry Sulzer, as recorded in deed record book G, page 117, of the records of Carroll county, Indiana, and all that lies west of the town of Carrollton, and supposed to contain four acres, more or less, in Carroll county, Indiana.” A trial resulted in a special verdict, in the form of interrogatories and answers, and a judgment in favor of the appellees, the verdict and judgment describing said four-acre tract as above described.

The sufficiency of the facts found to support a judgment for any of said lands, and to support a judgment for said four-acre tract is raised by the record and presented by the appellant’s brief. For the appellees, no brief or argument has been filed, but, after six months from the filing of appellant’s brief, and after notice to file briefs, counsel for appellees have declined to file a brief. The fact that the case had once before been in this court, 144 Ind. 604, with a reversal in favor of this appellant, and that this court had suggested the error in the description of the four-acre tract, seems not to have availed to secure a correction of the error, or to elicit from the appellees such attention to the case in this court as would aid us in considering the question involved.

Boyer v. Robertson et al.

Assuming that lot number four, in the town of Carrollton, is an established monument, from the north-west corner of which to begin the description of the four-acre tract, there is but one course given, "due west" to the west line of "said lot of land," a distance somewhat in doubt, since it is uncertain whether the "lot of land" is that sought to be described or the town lot mentioned. But, conceding that the reference is to the west line of the "lot" last mentioned, the town lot, we have no other course or distance given. As if to describe the tract by reference, it is said "to include all the land heretofore owned by one Henry Sulzer, as recorded in deed record G, page 117," "and all that lies west of the town of Carrollton." If the sheriff, in executing the judgment, could go to the deed records to learn what lands formerly owned by Sulzer were included, he would be sorely at loss to identify the lands included and referred to as "all that lies west of the town of Carrollton." However, it is not the duty of the sheriff to do that with reference to incomplete descriptions which the litigation should settle, and the evidence of which should be supplied by the decree or judgment. *Swatts v. Bowen*, 141 Ind. 322, and authorities there cited. Looking into the finding of the jury, we learn with what difficulty the sheriff would meet if he should go to deed record G, page 117, to ascertain what part of the four acres had been owned by Sulzer, since the jury say that excepting two lots 132 by 66 feet each, the deed to Sulzer conveyed eighty acres of land, in addition to which the boundaries of said four-acre tract would have to include all the land lying west of Carrollton within the half-quarter section named. The appellees claimed title through an administrator's sale, and it was found that appellant was an heir of the decedent; it was found, also, that notice of the pendency of the petition

Boyer v. Robertson *et al.*

to sell was published and was found by the court to be sufficient; this, the appellant insists, does not show jurisdiction over the person of the appellant in that proceeding, since it is not found that he was named as a defendant, and as such was included in the service of process or publication. In a collateral inquiry it has often been held that jurisdiction over the person will be presumed where the court has had jurisdiction of the subject-matter, and it does not affirmatively appear that the person raising the inquiry was not a party. *Bailey v. Rinker*, 146 Ind. 129; *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471; *Nichols v. State*, 127 Ind. 406; *Exchange Bank v. Ault*, 102 Ind. 322.

All facts necessary to the recovery of said two lots were returned and judgment against the appellant was proper thereon; but as to the four-acre tract, neither from the complaint, nor from the findings of the jury, could the court render a judgment including a sufficient description.

The judgment of the lower court is therefore reversed, with instructions to render judgment for the appellees as to said lots eleven and twelve, and as to the issues concerning the four-acre tract, to render judgment for costs in favor of the appellant, but to render no judgment as to the ownership or possession of said tract of four acres.

The costs of this appeal are adjudged against the appellees.

Chicago and Southeastern Railway Company v. McBeth et al.

CHICAGO AND SOUTHEASTERN RAILWAY COMPANY v.
MCBETH ET AL.

148 78
151 406

[No. 18,061. Filed Sept. 28, 1897. Rehearing denied Dec. 8, 1897.]

APPEAL AND ERROR.—*Failure to Except to the Appointment of Receiver.*—*Waiver.*—The failure of a party to except to the action of the trial court in the appointment of a receiver is a waiver of any question upon such appointment. pp. 79, 80.

SAME.—*Appointment of Receiver.*—*When Not Reviewed on Appeal.*—Where the record does not contain the affidavits upon which the question of the appointment of a receiver was submitted to the trial court, the question will not be reviewed on appeal. p. 80.

From the Clay Circuit Court. *Affirmed.*

H. Crawford, W. R. Crawford, F. E. Gavin, C. F. Coffin and T. P. Davis, for appellant.

A. W. Knight, A. Payne, S. D. Coffey, J. M. Rawley, T. A. Hutchison, E. S. Holliday and G. A. Byrd, for appellees.

HACKNEY, J.—The appellees, more than one hundred in number, sued the appellant, alleging that they held, severally, judgments, liens, and claims against the appellant and its railway property; that appellant had executed mortgages to almost the entire value of its property; that it was applying the earnings of the road to official salaries, and was making no payments upon said judgments, which judgments had been rendered more than four years, and that said company was insolvent.

It was alleged that the road extended, as an entirety, through several counties, and was operated as a public railway. The prayer sought an adjustment of the priorities of the several judgments and an ascertainment of the sums severally due the appellees, and the appointment of a receiver to take possession of the railway with its operating property, apply its revenues

Chicago and Southeastern Railway Company v. McBeth *et al.*

to the claims alleged, and to sell the property for the payment of any balances remaining.

The complaint and the following order entered in vacation constitute the only parts of the record brought to this court, to wit: "And now come the parties hereto, the plaintiffs by Messrs. A. W. Knight and others, their attorneys, and the defendant by Messrs. Matson & Luther and Mr. Stover, its attorneys, and the plaintiffs submitted their verified complaint and affidavits, together with the summons and notice of application for a receiver herein in the words and figures following (here insert), and now the said defendant moves the undersigned judge for a postponement of the hearing of the application for a receiver, which said motion is by the said judge sustained, and said application is set for hearing at 7 o'clock p. m. of this day.

"And now at the hour set for the hearing of said application come again the parties by their attorneys, aforesaid, defendant again moves for a postponement of this cause, and files affidavits in support (here insert) thereof, which motion is overruled, to which defendant excepts, and ten days given to file bill of exceptions, and said application is by agreement submitted to the undersigned judge for hearing and determination, and the evidence being fully heard and all things touching said application duly considered, the said judge sustains the application of the said plaintiff. It is therefore ordered and decreed by the said judge that Alexander C. Campbell be and he is hereby appointed receiver herein of the said defendant and its property, and that he execute bond for the faithful performance of his duties as such receiver in the sum of ten thousand dollars, and day is given."

It will thus be seen that the appellant, although a party to the proceeding, present and participating,

Davis et al. v. Talbot et al.

did not except to the action of the judge in making the appointment. It has been held that such failure is a waiver of any question upon such appointment. *Lime City Building, etc., Association v. Black*, 136 Ind. 544. It is the general rule, created by statute, section 638, Burns' R. S. 1894, that a party objecting to a decision must except at the time the decision is made. No suggestion is made as to why this rule does not apply in this case.

It will be observed, also, that the question of the appointment was submitted to the judge below upon affidavits filed, in addition to the verified complaint. In such case, the appeal being from the interlocutory order of appointment, the affidavits, which may enlarge and supplement the allegations of the complaint, should be considered in connection with the complaint. *Supreme Sitting, etc., v. Baker*, 134 Ind. 293; *Naylor v. Sidener*, 106 Ind. 179. Since the record before us does not bring up the affidavits, we are denied the privilege of considering the case upon the record made and acted upon below. All of the questions argued depend upon a condition of the record not fully presented, and they are, therefore, not considered. The judgment is affirmed.

DAVIS ET AL. v. TALBOT ET AL.

149 80
151 533

[No. 18,172. Filed Oct. 6, 1897. Rehearing denied Dec. 8, 1897.]

APPEAL.—*Record*.—*Lost Pleading*.—A document furnished by counsel as a substitute for a lost pleading without any order of the trial court is no part of the record.

From the Montgomery Circuit Court. *Affirmed*.

Ristine & Ristine, for appellants.

Wright & Seller, for appellees.

HACKNEY, J.—The assignment of error in this case

Hannan v. The State.

is upon exceptions to conclusions of law rendered by the trial court upon facts specially found. The record affirmatively discloses that the issues presented to the trial court arose upon three paragraphs of complaint, neither of which is in the transcript. The transcript recites that the pleadings were lost from the files, and that the attorney for the defendants, appellants in this court, filed, as a substituted complaint, a document purporting to be a complaint in a single paragraph.

It is manifest that findings of fact and conclusions of law can only be measured in the light of the issues submitted to the trial court. Here we are denied an opportunity to know the issues submitted upon two paragraphs of complaint, and it does not appear that the third paragraph was substituted by order of the trial court. Without such order there could be no proper substitution. The record, therefore, presents no basis for a consideration of the court's conclusions of law. *Burkham v. McElfresh*, 88 Ind. 223; *State, ex rel., v. Earl*, 133 Ind. 389. The judgment is affirmed.

HANNAN v. THE STATE.

[No. 18,312. Filed Sept. 14, 1897. Rehearing denied Dec. 8, 1897.]

EVIDENCE.—*Weight Of*.—The Supreme Court will not review the evidence where there was competent evidence to sustain the verdict. *p. 82.*

INSTRUCTIONS.—*Joint Assignment of Error*.—Where error is assigned jointly to the giving of two instructions, both instructions must be bad or the assignment will not be available. *p. 83.*

SAME.—Where error is assigned in giving certain instructions all of the instructions given must be set out in the transcript. *p. 83.*

SAME.—*Appeal and Error*.—*Bill of Exceptions*.—The instructions must be embraced in a bill of exceptions and signed by the judge in order to become a part of the record on appeal. *p. 83.*

From the Elkhart Circuit Court. *Affirmed.*

149	81
151	490
151	514
151	664
149	81
161	296

Hannan v. The State.

Ethan A. Dausman, for appellant.

W. A. Ketcham, Attorney-General, *Merrill Moores* and *C. G. Sims*, for State.

HOWARD, J.—The appellant was convicted of petit larceny, sentenced to State's prison for one year, fined one dollar, and disfranchised for one year.

We are asked to reverse the judgment on the evidence and on instructions given by the court.

The able and ingenious attorney for the appellant gives in his brief a very full and fair abstract of the evidence; and while his presentation of the evidence and argument thereon leaves it doubtful whether the preponderance of the evidence was not in favor of the appellant, yet there was evidence, competent and sufficient, according to which the jury might have held, as they did, that the appellant was guilty as charged. It may be true, as argued, that the prosecuting witness was of intemperate habits, but it does not follow for such reason that the jury might not believe his testimony. The jury were also to determine from the evidence whether the appellant, who had the watch in his possession so soon after the time when it is alleged to have been stolen, had given a sufficient explanation of his possession of it. The jury may have erred in the weight which they gave to the different items of evidence introduced before them. Those, however, were matters of fact of which they were the exclusive judges, and we cannot review their determination of such matters of fact. It is enough for us to know, and all that we are authorized to determine, that there was competent evidence sufficient to sustain the verdict.

There are several reasons why the alleged error of the court "in giving instructions numbered seven (7) and ten (10)" is not available to reverse the judgment.

Graham et al. v. Lunsford et al.

To make the assignment good, both instructions should be erroneous; whereas, as we think, one, at least, was good. Again, it does not appear affirmatively that the instructions set out in the transcript were all the instructions given by the court. But, more than all, it appears that the instructions objected to are not in the record.

"All exceptions in criminal causes, not saved by the entry of the clerk as a part of the proceedings in court," it was said in *Leverich v. State*, 105 Ind. 277, "must be embraced in a bill of exceptions. There is, consequently, no question before us upon the instructions copied into the transcript." See, also, *Meredith v. State*, 122 Ind. 514; *State v. Hunt*, 137 Ind. 537; *Chandler v. State*, 141 Ind. 106.

There was an attempt to bring the instructions in the case at bar into the record by a bill of exceptions; but the bill was not presented to the judge for his examination, nor was it signed by him. The certificate of the clerk alone is not sufficient, without the certificate and signature of the judge, to authenticate a bill of exceptions so as to make it a part of the record. The error in failing to present the bill to the judge for his signature, was, without doubt, an inadvertence; but none the less it is fatal to the validity of the bill as a part of the record.

Judgment affirmed.

GRAHAM ET AL. v. LUNS福德 ET AL.

[No. 17,802. Filed December 9, 1897.]

QUIETING TITLE.—*Plaintiff Must Recover on Strength of His Own Title.*—In an action to quiet title to real estate the plaintiff must prevail on the strength of his own title, the failure of the defendant to establish title to the real estate in question can furnish no ground for recovery. p. 88.

Graham *et al.* v. Lunsford *et al.*

SAME.—*Estoppel.*—A grantor of real estate is not estopped by his covenants of warranty from asserting after acquired title to the lands conveyed as against the heirs of his grantee, where his title to such real estate was quieted in an action brought by grantee's heirs. *pp. 88, 89.*

SAME.—*Estoppel.*—A judgment rendered against defendants for costs in an action in ejectment cannot operate as an estoppel against defendants in an action by plaintiff to quiet title to such real estate. *p. 89.*

From the Daviess Circuit Court. *Affirmed.*

James W. Ogdon, for appellants.

A. J. Padgett and J. H. O'Neill, for appellees.

JORDAN, J.—This action was instituted by appellants against appellees, John C. and Mary J. Lunsford, to recover possession of, and to quiet their title to the following described real estate, situated in Daviess county, Indiana, to wit: Beginning 168 90-100 rods north of the southeast corner of section 18, township 2 N., R. 7 west, running thence due west to Veal's Creek, thence up said creek with the meanders thereof to the boundary line of said section, thence south to the place of beginning.

The defendants answered the complaint by a general denial. The question of title which appellants seek to present arises on the special finding of facts and the court's conclusion thereon. The facts found by the court are in the main substantially as follows: Plaintiffs and defendants claim their respective titles to the land in dispute through one James C. Veal. On March 23, 1877, one John Scudder owned and held a judgment unsatisfied against the said James C. Veal, which was a lien on the said lands. On April 4, 1883, the sheriff of Daviess county, Indiana, executed a sheriff's deed to William F. McDougal, to the following lands in said county: All that part of section 18, township 2 N., R. 7 west, more particularly described as follows: Beginning 168 1-2 rods N. of the S. E.

Graham et al. v. Lunsford et al.

corner of said section 18, running thence due west to Veal's Creek, thence up said creek with the meanders thereof to the east side of said section, thence south to the place of beginning. The finding then states that this sheriff's deed recites that on September 27, 1881, in a certain action in the Daviess Circuit Court, wherein William H. Dillingham et al. were plaintiffs, and Jas. C. and Mary E. Veal et al. were defendants, a judgment was rendered against said Veal et al. for the sum of \$50,511.54, and a foreclosure of a mortgage executed by said Veals was decreed by the court, and all of the interest of the said Jas. C. and Mary E. Veal in and to certain lands was ordered to be sold, among which was the tract above described. It is found by the court that said deed further recited the issuing of a copy of the decree to the sheriff of the county, who, after duly advertising the sale of the lands, sold the same on the — day of —, 1882, to John H. O'Neal, for the sum of \$——. That a certificate of sale was executed to said purchaser by the sheriff, which was assigned to William F. McDougal, to whom a sheriff's deed was executed, after the expiration of one year. The court further finds that on April 17, 1883, McDougal and wife joined O'Neal and David J. Heffron and their wives in a deed conveying the lands in controversy, among others, to Thomas B. Graham. That in said deed of conveyance McDougal conveyed and quitclaimed to Graham, and O'Neal, and Heffron conveyed and warranted the land to him. Graham occupied said lands and used the same until the summer of 1885, when he died, leaving a will, by which he devised all of his real estate to his surviving widow, Margaret Graham. On October 9, 1886, an execution was issued on the Scudder judgment, rendered in March, 1877, against Veal, and the sheriff of Daviess county levied the same for the amount due thereon,

Graham et al. v. Lunsford et al.

on all the interest of Veal in section 18, township 2 N., R. 7 west, not devested by a certain mortgage, executed to Thomas B. Graham, by said Veal, and on March 5, 1887, after duly advertising the sale, sold the said lands to William F. McDougal, and on May 12, 1890, a sheriff's deed, under said sale, was executed to said purchaser for all of said section 18, except 337.80 acres off of the south side thereof, and except that part of said section lying north of Veal's Creek; this deed was duly recorded. On August 31, 1888, Margaret Graham commenced an action in the Daviess Circuit Court against said McDougal to quiet title to these and other lands, and such proceedings were had in said suit, that under the issues joined therein between the parties, the court adjudged McDougal to be the owner of all that part of said section 18 lying south of Veal's Creek and north of a line drawn east and west through the section so as to leave 337.80 acres on the south side of this line, and quieted the title in McDougal thereto, against said plaintiff and all persons claiming through her. Subsequently, in July, 1889, a controversy arose as to the north line of the 337.80 acres, and a survey, on notice of McDougal to Margaret Graham, was made, and said line established and a fence was built along the line; after this fence was built McDougal used and controlled the land between this fence and Veal's Creek until he disposed of it to the appellees, by conveying to them, by a warranty deed, on October 30, 1890, which deed was duly recorded. The appellees have been in possession of said lands and have improved the same. Margaret Graham subsequently died intestate, leaving the appellants as her only heirs at law. In April, 1893, the appellees commenced an action in ejectment in the Daviess Circuit Court against appellants, alleging in their complaint that they were the owners and en-

Graham et al. v. Lunsford et al.

titled to possession of that part of section 18, township 2 N., R. 7 west, etc., the realty being described by the same boundaries as it is in the complaint in the case at bar. Appellants filed an answer in said suit in denial, and upon the trial, the court adjudged that said plaintiffs take nothing by their said action, and that the defendants recover their cost. On these facts the court stated its conclusions of law, which are in substance as follows:

1st. That Jas. C. Veal, on and prior to April 4, 1883, was the owner in fee of the real estate in dispute, subject to the mortgage liens of John Scudder, William H. Dillingham and others, and on said date the sheriff conveyed all of his and his wife's interest in said lands to William F. McDougal.

2d. That the deed of McDougal, O'Neal and Heffron, of April 17, 1883, operated to convey all of the interest of said McDougal in said lands to Thomas B. Graham.

3d. That the judgment lien of John Scudder, of date March 3, 1877, was superior and paramount to the interest and title which said Graham acquired to the lands, under the said deed of McDougal, O'Neal, and Heffron.

4th. That the title acquired by McDougal in the real estate in question, under the sheriff's deed of May 12, 1890, was superior to the title then owned and held by Graham to the land, under his deed from McDougal, O'Neal, and Heffron.

5th. That the judgment of the court in the action instituted by Mrs. Graham quieted the title of McDougal to the lands.

6th. That the judgment of the court in the action of the appellees against the appellants in October, 1893, did not pass upon, adjudge, or determine the title to the real estate, or in any manner change, modify, or

Graham et al. v. Lunsford et al.

amend the decree of the court quieting McDougal's title in the former action prosecuted by Mrs. Graham.

7th. That the defendants are entitled to a judgment for cost.

The court rendered its judgment that the plaintiffs take nothing by their action, and that the defendants recover cost. Under the provisions of section 1069, Burns' R. S. 1894 (1057, R. S. 1881), and a rule well affirmed by repeated decisions of this court, the appellants, in order to prevail in this suit, must do so on the strength of their own title. The burden was cast upon them to show a sufficient title to the lands in dispute; and the failure of appellees to establish any title thereto could afford the former no ground whatever for a recovery. It is evident, therefore, under the facts as found by the court, that the appellants fell far short of establishing title to the tract of land which they sought to recover. Their counsel insist that McDougal must be held not only to have quitclaimed his interest in the lands to Thomas B. Graham, by joining in the O'Neal and Heffron deed, in which the latter conveyed and warranted, but he must be deemed and held also to have joined them in their warranty, and was thereby estopped from asserting any after-acquired title to the lands, as against said Graham or those claiming through him. But if this contention should be conceded as correct, it could not avail appellants in this action, for it appears that in 1888, five years after the execution of the McDougal and O'Neal deed to Graham, in an action by the widow of the latter, who claimed title under his will, McDougal succeeded in quieting his title to the lands in controversy, as against Mrs. Graham and all persons claiming through her. If it could be said that McDougal was estopped by any covenants of warranty, such estoppel could be of no avail in consideration of the decree

quieting his title to the realty. That decree effectually precluded the plaintiff in that action, and the appellants, who claim as her heirs, from asserting any title or claim to the lands in which McDougal's title was quieted, and would have enabled the latter, if necessary, to have maintained an action thereon for the recovery of the possession of such lands. *Farrar v. Clark*, 97 Ind. 447.

It is disclosed by the facts that after the rendition of the judgment quieting the title in McDougal, and after the survey mentioned in the special finding, he used and controlled the land until he conveyed it to the appellees in 1890. It further appears by the special finding that the appellees, in 1893, unsuccessfully prosecuted an action in ejectment against appellants to recover possession of the land in question, and that a judgment was rendered in that suit in favor of the latter for cost. This, it is contended, operates as an estoppel against the appellees, and affords the appellants the right to recover in this action. But appellees are not seeking to recover or quiet any title to the land in suit, and it is clear that under the circumstances the judgment in that action cannot be invoked in this suit by appellants to support their title to the premises in controversy. This, we think, is so evident, under the facts, that the question may be dismissed without further consideration. See Black on Judgments, sections 650, 654, and 655; Freeman on Judgments, sections 295, 300, and 301.

Appellants having failed, under the facts, to establish title to the land, the judgment below, so far as they are concerned, is a correct result, and is therefore affirmed.

Drake v. Schoenstedt.

DRAKE v. SCHOENSTEDT.

[No. 18,349. Filed December 9, 1897.]

DRAINS.—Injunction.—For the purpose of preventing threatened injury to land and avoiding a multiplicity of damage suits therefor, one may be restrained from flooding the lands of another with waters that would not naturally flow thereon. *pp. 91, 92.*

SAME.—Injunction.—Where a drain was constructed under the provision of section 5656, Burns' R. S. 1894 (4286, R. S. 1881), and a forty-acre tract of land was assessed, with benefits, for the drainage of two acres of such tract, the owner thereof will be restrained from draining additional portions of such forty-acre tract by lateral ditches into such drain, where it is shown that such waters naturally flow in another direction, and that such drain is insufficient to carry such additional water without damage to other landowners whose lands are drained by such ditch. *pp. 92-94.*

From the Adams Circuit Court. *Reversed.*

Peterson & Lutz, for appellant.

Richard K. Erwin, for appellee.

HOWARD, C. J.—This was a suit by appellant to restrain appellee from draining into a tile ditch, to the injury of appellant's land, certain waters which otherwise would flow in a different direction.

The facts as found by the court show: That appellant owns thirty acres of land lying immediately south of and below a forty-acre tract owned by appellee; that, in 1888, the board of county commissioners constructed a six-inch tile drain, beginning in appellee's said tract and eight rods north of the line dividing his land from appellant's, thence south through said eight rods of appellee's land and through appellant's said tract to an outlet in another drain, called Meyer's ditch; that said thirty acres of appellant's land was in said proceeding estimated as benefited by said tile drain, and the whole thereof assessed therefor; that two acres only of appellee's said land near to and

Drake v. Schoenstedt.

around the head of the drain, were estimated as benefited, but the whole forty acres were assessed therefor; that said tile drain is sufficiently large to carry off all the water which naturally comes on said two acres of appellee's and said thirty acres of appellant's, but is not sufficient to carry any more; that appellant's grantor was assessed for the construction of said drain \$126.20, with \$11.16 costs, and appellee \$14.05, with \$1.24 costs; that two and a half or three acres of appellee's land surrounding the head of the tile ditch are drained into it; that the appellee is constructing private drains on parts of his said forty-acre tract so assessed, with a view of putting tile therein and connecting said tile and drains to said public drain, and by so doing will bring waters from distant parts of his said land into said public drain, which waters would flow in another direction and would not, but for said private drains, flow into or be drained by said public drain, thereby adding more water, and draining from fifteen to twenty acres of his said land into said public ditch, the addition of which will keep back the water which falls or comes naturally on appellant's land, and thereby injure the same.

As its conclusion of law the court found that the appellant should take nothing by her complaint.

The facts found show that the six-inch tile drain constructed in 1888 was calculated and intended to drain appellant's thirty acres and appellee's two acres, and no more, and that the assessments were made accordingly. It also appears that appellee is now about to drain into said tile the waters on fifteen or twenty acres additional, which waters naturally flow in another direction; and that if such additional drainage is turned into the six-inch tile it will prevent the drainage of appellant's lands and thus damage her.

It has frequently been held that, for the purpose of

Drake v. Schoenstedt.

preventing threatened injury to land and avoiding a multiplicity of damage suits therefor, one may be restrained from flooding the lands of another with waters that would not naturally flow thereon. *Lake Erie, etc., R. W. Co. v. Young*, 135 Ind. 426, 41 Am. St. 430, 58 Am. and Eng. R. R. Cases 665, and authorities there cited.

The reason that seems to have influenced the court in refusing the injunction in this case is, that appellees's forty-acre tract was all assessed for the construction of the six-inch tile drain, and that he had therefore a right to turn the waters from all that tract into said drain. This would undoubtedly be true if the drain had been originally constructed with a capacity sufficient to receive such waters. But the drain was made of a capacity to draw off the waters from two acres only of appellee's land, being all that naturally flowed in that direction, and appellee was assessed only to that extent.

In *McAllister v. Henderson*, 134 Ind. 453, it appeared that two adjoining proprietors had constructed a tile drain of sufficient capacity to carry the water that would naturally flow along the course of the drain as then laid. Afterwards the upper proprietor lowered the drain on his ground, and also, as in this case, constructed lateral drains, bringing into said tile waters that did not naturally flow therein, thus overtaxing the drain and rendering it insufficient for the drainage of the lower proprietor's land. The court held that by such action the upper proprietor had wrongfully caused waters to flow into the drain, and through the drain into and upon the lands of his neighbor.

If the drain were originally constructed of a capacity to carry all the water that fell upon appellee's land, we should have quite a different case. For, as said in *Lipes v. Hand*, 104 Ind. 503, "where the con-

Drake v. Schoenstedt.

struction of a large ditch enables property owners to carry their lateral ditches into it, and thus secure good drainage without encroaching upon the rights of others, there is a special benefit. This results from the rule that one landowner has no right to collect water in a body and pour it upon the land of another. * * * Where a landowner obtains an outlet for the lateral ditches constructed for the drainage of his land, by means of a large ditch, or by reason of the widening, deepening, and straightening of a natural stream, he receives a special benefit, for he is thus provided with means of drainage without injury to others."

This was not done in the case before us. A large ditch was not here constructed of a capacity to receive lateral ditches to drain appellee's whole forty acres; but merely a six-inch tile drain was laid, sufficient only to receive the waters that naturally flowed from two acres of appellee's land and thirty acres of appellant's. It would, therefore, be manifestly inequitable now to allow him to turn from their natural course into this small drain all the waters on his forty acres, and thus render the tile insufficient for the drainage of the land of appellant.

In estimating that two acres of appellee's land would be benefited, and in assessing this benefit upon his forty-acre tract, the drainage authorities seem to have proceeded in strict accordance with the statute (section 5656, Burns' R. S. 1894, 4286, R. S. 1881), which provides that "they shall accurately describe, as the same is described on the county tax duplicate, each parcel of land to be assessed for the construction of said ditch, giving the number of acres in each tract assessed, and the estimated number of acres benefited."

Nor is it to be said that if the injunction in this case

Tate v. Hamlin *et al.*

is issued that appellee will be unable to drain that part of his land now sought to be drained by lateral ditches. In the first place, the court finds that the waters sought to be turned into the old tile drain are waters "which would flow in another direction and which would not, but for said private drains, flow into or be drained by said public ditch." It would, therefore, seem that appellee ought to seek another outlet for his proposed drainage, and not attempt to force the waters out of their natural course and over and upon appellant's land. But even if the proposed drainage might properly be conducted along the line of the old tile drain, there is nothing to prevent appellee from bringing his petition for that purpose; so that the six-inch tile may be taken up and a larger one substituted, sufficient in size to carry off all the waters from appellee's forty-acre tract and from such other lands, if any, as may be drained to the same outlet. That a new drain may be laid along the line and in place of an old ditch already in use, but insufficient for the drainage required, has frequently been decided. *Zigler v. Menges*, 21 Ind. 99; *Denton v. Thompson*, 136 Ind. 446.

The judgment is reversed, with instructions to the court to restate its conclusions of law in accordance with this opinion, and to enter judgment thereon in favor of the appellant.

TATE *v.* HAMLIN *ET AL.*

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[No. 17,611. Filed Sept. 24, 1895. Petition to modify opinion denied Nov. 19, 1895.]

APPEAL.—Notice.—An appeal is perfected by filing a transcript with a proper assignment of error thereon, within the time limited for taking an appeal, without the service of notice on the appellee. *pp.* 96, 97.

Tate v. Hamlin et al.

SAME.—Notice.—Process.—Statute Construed.—The notice provided by section 652, Burns' R. S. 1894 (640, R. S. 1881), to be issued by the Clerk of the Supreme Court in appeals after the close of the term at which the judgment is rendered must be served on the appellee. Notice served on appellee's attorney is insufficient. *pp. 96-103.*

SAME.—Notice.—Dismissal.—An appeal will not be dismissed for failure properly to notify appellee of the pendency thereof, but the submission will be set aside for such cause. *p. 103.*

From the Marion Superior Court. *Submission set aside.*

S. M. Shepard, J. E. McCullough, H. N. Spaan, F. Knefler and J. F. Berryhill, for appellant.

W. V. Rooker, L. C. Walker and W. D. Bynum, for appellees.

MCCABE, J.—A special appearance has been entered in this cause by the appellees for the sole purpose of making a motion by them to dismiss this appeal. The reasons assigned in the motion are: (1) That this court is without jurisdiction of the appellees; (2) said appeal was taken without filing a bond, and without notice to these appellees; (3) no notice of appeal was ever issued to or served by any officer of this court, nor was any return of service of notice of appeal ever made to this court by a person authorized by law to make returns to this court.

The appeal, it is conceded, is not a term time appeal, but was taken, if at all, after the close of the term at which the judgment appealed from was rendered. It is therefore a conceded proposition that notice to the appellees is necessary before this court can acquire jurisdiction over them to hear and determine the same. Appellant's learned counsel, however, contend that the appellees have been duly notified of the appeal as the law directs.

On the filing of the transcript, with the assignment

Tate v. Hamlin et al.

of errors thereon, the clerk of this court issued a notice, directed to the sheriff of this court, commanding him to notify the appellees, naming them, or their attorneys of record, naming them also, that on the 8th day of May, 1895, the appellant had filed in his said office a transcript of the record and proceedings in the cause, naming it, and that at the expiration of thirty days from the service of that writ said appeal would be submitted to said Supreme Court. The return of the sheriff of Marion county states that the writ came to his hands May 9, 1895, on which day he served it by reading the same to the attorneys therein named.

Affidavits filed with the motion show that appellees now reside in the city of Indianapolis, and have ever since the litigation begun, and have not been served with any notice of the appeal, and that their attorneys on whom the process was served had been discharged as far back as 1890, and that appellant knew that fact.

It is contended on behalf of the appellees that if no legal notice of the appeal has been given, the same has not been perfected, and hence no appeal has been taken within the time limited therefor; and as no appeal can be now taken the appeal must be dismissed.

On the other hand, the appellant contends that filing the transcript, with an assignment of errors thereon, within the time limited, perfects the appeal. It is conceded that the transcript and the assignment of errors thereon were filed in time.

The section of the code that regulates ordinary appeals after the term at which the judgment is rendered reads as follows: "After the close of the term at which the judgment is rendered, an appeal may be taken by the service of a notice in writing on the adverse party or his attorney, and also on the clerk of the court in which the proceedings were had, stating

Tate v. Hamlin et al.

the appeal from the judgment or some specific part thereof; or such appeals may be taken by procuring from the clerk of the court a transcript of the record and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the Clerk of the Supreme Court, who shall endorse thereon the time of filing, and issue a notice of the appeal to the appellee."

Two methods of giving notice of an appeal are provided for in this section. If the language of the first clause of the section were to be construed according to its strict letter regardless of other sections concerning appeals to this court, we should be constrained to hold that the appeal therein referred to could be taken by giving the notices therein specified without doing anything else. But it has been held by this court that that part of the section must be construed along with the other sections on the subject, and when so construed it means that it is essential to such an appeal that the transcript must be filed within the time limited therefor in other sections. *Johnson v. Stephenson*, 104 Ind. 368. It is also well settled by the decisions of this court that the filing of the transcript with a proper assignment of error thereon within the time limited for taking an appeal perfects the appeal without the service of notice on the appellees. *Harshman v. Armstrong*, 43 Ind. 126; *Johnson v. Stephenson*, *supra*; *Wright v. Manns*, 111 Ind. 422.

Counsel for appellees, however, contends that, "the giving of notice is just as essential to the perfecting of an appeal as the filing of the transcript and assignment of errors, and all must be done within the time limited for perfecting the appeal," and cite *Holloran v. Midland R. W. Co.*, 129 Ind. 274, in support of that proposition.

Tate v. Hamlin et al.

The notice there involved was not a notice to the appellees, but was a notice to a co-party. While that appeal, like the one before us, was attempted to be taken after the close of the term, yet it did not belong to exactly the same class of appeals, in all respects. The judgment in that case was rendered on May 15, 1888, the transcript filed on November 15, following; and no notice was ever given to the co-party to the judgment, who did not appeal, as required by section 647, Burns' R. S. 1894 (635, R. S. 1881). On March 20, 1891, nearly three years after the judgment had been rendered, the appellee filed a motion in this court to dismiss the appeal. The appellants thereupon procured the written consent of the nonappealing co-parties to appear in this court and decline to join in the appeal, and the appellants filed the same in the clerk's office, and also asked leave to amend their assignment of errors so as to make such nonappealing co-parties parties to the appeal in this court. This court there said: "The appeal cannot be maintained by filing in the clerk's office of this court a written appearance of the judgment defendant not made a party to the appeal, and his refusal to join in the appeal after nearly three years have elapsed from the time of the rendition of final judgment in the circuit court." And the appeal was dismissed for those reasons.

That is far from deciding that notice to the appellee is essential to the perfecting of the appeal, nor is that case in conflict with those cited above, to the effect that filing the transcript with an assignment of errors thereon perfects the appeal without notice to the appellees. The appeal, therefore, in the case before us was duly taken. The question remains whether there has been legal notice of the appeal served on the appellees, and if not, what effect that has on the appeal.

Tate v. Hamlin et al.

The section quoted provides for two kinds of notice, as already observed, either one of which, at the option of the appellant, may be given. The first is an unofficial notice, and the second kind is an official notice. The first is an unofficial notice because there is no provision that it shall be issued by an officer or served by an officer, while the second is required to be issued by an officer, namely, by the clerk of this court, and section 7801, Burns' R. S. 1894 (5833, R. S. 1881), requires the sheriff of this court or his deputy to serve such notice. The appellant in this case elected to rely alone upon an official notice. He could have written out and served the other kind of notice himself, one on the clerk of the court and the other on the adverse party or his attorney. But he relied on the direction, doubtless, usually given by an appellant to the clerk of this court,—to issue the proper notice of the appeal.

The process, as we have seen, was issued for the appellees or their attorneys, naming them. It was not served on the appellees named therein, but was served on the attorneys that had formerly acted in the case as appellees' attorneys. There is no question but that the process would have been good if it had been served on the appellees therein named. Whether its service on the appellees' attorneys was notice to the appellees must depend on the question whether the clerk of this court had any legal authority to issue notice of an appeal to the attorneys of the appellees. That question is answered in the negative by the express language of the section we have quoted, which requires such clerk to "issue a notice of the appeal to the appellee." In *Vogel v. Brown Township*, 112 Ind., at page 301, this court said: "It is apparent, therefore, that the utmost that can be granted the appellant is, that he asked and obtained a writ against the agent, and not against the principal. This, certainly, will not support a judg-

Tate v. Hamlin et al.

ment against the principal, for the general rule—and it is an elementary one—is, that the summons must issue against the principal, and not against the agent.” And in *Vogel v. Brown School Township*, 112 Ind., at page 317, it was said: “This case is substantially the same as that of *Vogel v. Brown Tp.*, ante, p. 299, and is governed by the principles there declared. In this case, as in that, the summons was directed against the agent, and not against the principal. * * * As there was no summons against the school township, there could be no legal notice, and without legal notice there could be no valid judgment. * * * Nor is the objection to the form of the writ; it goes much deeper; it is that the writ was not issued against the defendant, but against another person.”

In the case now before us the writ was issued against the appellees, the proper persons, and also against their agents, or their former attorneys, and the service was alone upon such agents. It follows, from the principles announced in the cases cited that there was no legal authority in the clerk to issue the notice of the appeal against the agents of the appellees, even if they had not been discharged long before the process was issued.

Some confusion has crept into the practice of the clerk of this court in issuing process under this section. It seems to have been supposed that if the unofficial notice provided for in the section might be served on the attorney of the appellee, that the official notice might be likewise served. But according to elementary principles declared above, process must go against the principal, and not his agent, unless the contrary is expressly authorized by statute. We have seen the contrary is not expressly, nor even impliedly, authorized by statute as to the official notice provided for in the section now under consideration. The con-

trary is only partially provided for therein as to the unofficial notice authorized. The unofficial notice therein authorized would not be good, served on the appellees' agent and attorney alone. It must also be served on the clerk of the court in which the proceedings were had. So that in no case can service of notice of an appeal to this court on the attorney of the appellee alone confer jurisdiction over the appellee, whether it be an official or an unofficial notice. The notice or process in this case as to its legality and validity stands practically as if it had been issued against the agents or attorneys of the appellees, as it was alone served on them. There being no legal authority in the clerk to issue notice of an appeal to or against the attorneys of an appellee, that part of the writ in this case was void, and consequently its service upon the attorneys named therein was without authority of law and void, and was no legal notice of the appeal to the appellees.

The want of notice to the appellee was held by this court not to be ground for dismissing the appeal, but a proper ground for setting aside the submission in *Johnson v. Miller*, 43 Ind. 29. That, we think, is the proper disposition to make of such a case, unless it falls under and is controlled by rule thirty-six of this court. That rule provides that: "Where a cause appealed in vacation has been on the docket ninety days or more, and there is no appearance by the appellee, and no steps have been taken to bring him into court; or where a notice has been issued and proves ineffectual from any cause, and no steps are taken for more than ninety days after the issuance of such ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal."

Notice was issued in this case because it was issued against the appellees, the proper parties, though

Tate v Hamlin et al.

it also included the attorneys, who, as we have seen, were not the proper persons to issue notice to *br* against, but that, as we have seen, did not vitiate the notice to the proper parties if it had been served upon them. Therefore, the case does not fall under the first clause of the rule. It does fall under the second clause because the notice proved ineffectual, being served upon the wrong persons.

The notice was served, as we have seen, May 9, 1895, and was returned and filed in the clerk's office of this court on May 18, following. If the fact that it was served on the former attorneys of the appellees instead of being served on appellees makes the notice ineffectual within the meaning of the rule, then the appeal ought to be dismissed. The rule ought to have a reasonable interpretation. It was evidently intended to prevent an appellant from delaying the speedy hearing of the appeal, either through his negligence or design. The case most likely in the minds of the framers of the rule as liable to happen, was where the notice is returned by the officer that the appellee was not found in his county. The failure to take other steps to get notice of the appeal served for ninety days after such return, would clearly be such negligence on part of the appellant as the rule was intended to punish with a dismissal of the appeal. But in the case now before us there was a service of a notice such as the clerk of this court has been in the habit, through misapprehension of the law, and our rules of issuing, and the sheriffs of the several counties of serving, as this was served for years in like cases. And such process, coming as it did from a source so near this court, that the practice has gone unquestioned up to the present case by the bar of the State, under the probable supposition that this court had under some rule or order authorized notice of appeals to be issued and served as this one was.

Tate v. Hamlin et al.

To hold that the failure to take out other process within ninety days after the return of the notice served on appellees' attorneys, the cause having been submitted on that service, would be to hold that an appeal ought to be dismissed for unintentional and excusable negligence of the appellant under that rule.

In two appeals this court relieved appellants against their excusable mistakes in complying with certain statutory provisions in taking their appeals. *Hutts v. Martin*, 131 Ind. 1; *Bank of Westfield v. Inman*, 133 Ind, 287. Under the circumstances the appellant's failure to take out other process after his appeal was submitted is not sufficient cause under the rule to warrant the dismissal of the appeal, especially as the appellees have not asked the dismissal of the appeal on that ground.

The conclusion reached renders the other grounds urged for the dismissal of the appeal wholly unimportant, and we do not consider them. The motion to dismiss the appeal for want of notice thereof served on the appellees is overruled, and the submission of the appeal is set aside, at the costs of appellant, with directions to the clerk to issue new notice to the appellees in accordance with this opinion, unless otherwise ordered by the appellant or his attorneys. And the cause is retained on the docket of this court for further action therein.

ON PETITION TO MODIFY OPINION.

MCCABE, J.—The petition asks us to modify our former opinion and judgment so that the appeal shall be dismissed for a failure of appellant to comply with rule thirty-six of this court. It seems to be supposed that we would have done so at first if such relief had been asked by the appellees.

Appellees' counsel vigorously complain that the de-

Tate v. Hamlin et al.

cision presents the anomalous aspect of holding that an appellant is entitled to relief on the ground of excusable neglect where he causes process to issue to and be served on agents whose authority has expired five years previously to the knowledge of the appellant. Counsel says: "How preposterous it would be for one to direct process to a person whom he knew had been out of life five years, and then when his action was challenged to urge that his neglect was excusable. Such is the exact force of this decision. It will lead to more confusion in the *nisi prius* courts than has ever followed from any decision defining excusable neglect." Just what the *nisi prius* courts will ever have to do with a question of practice in this court under one of its written rules touching the dismissal of appeals in this court for negligence, is something the learned counsel has not deigned to enlighten us upon.

Since counsel is so emphatic in opposition to excusing the neglect of the other side to comply with the strict letter of one of our rules, it might be well for him to inquire whether he has not, by his own neglect, waived the point he is now urging. He entered a special appearance in this court for the appellees for the sole purpose, as stated in the motion to move to dismiss the appeal for want of jurisdiction, in that appellees had not been served with notice.

The only reason urged in argument in support of the motion was that the appeal was not perfected or taken without the service of such a notice, and as the time limited for taking an appeal had expired, the attempted appeal should be dismissed.

Having decided that the appeal is, and was perfected by filing the transcript with a proper assignment of error indorsed thereon, we went beyond the brief and argument of counsel and inquired what effect rule thirty-six of this court had upon the question.

Tate v. Hamlin et al.

Counsel, abandoning his former position, comes now and asks this court, under the guise of a motion to modify its former judgment, to dismiss the appeal for failure of appellants to comply with rule thirty-six of this court. No such reason for dismissing the appeal was hinted at, or suggested, in the argument, though appellees' learned counsel filed two able briefs in support of the motion to dismiss. And yet counsel gravely tell us that "this result of the court's ruling cannot be regarded otherwise than astounding," because we presume that the motion to dismiss was not sustained on grounds never mentioned and presumably never thought of by the learned counsel before the decision was made.

What we meant in the original opinion was, that while the case falls within the strict letter of the last clause of rule thirty-six of this court, yet it did not fall within the spirit of the rule. We did not intimate, nor intend to intimate, that a failure to comply with the regulations provided by statute or the rules of this court in taking and perfecting appeals here could be excused on the ground that the party or his attorney did not or could not understand the law or the rule of the court. But we meant simply that the practice of the clerk of this court of many years' standing, and seemingly sanctioned by this court, of issuing process against the attorneys of appellees had afforded just grounds for misleading the attorneys of the State into the erroneous supposition that this court was of opinion that such practice was authorized by the statute. And, hence, to apply the rule to appeals heretofore taken to the extent of dismissing the appeal for want of compliance with the rule would be to punish a party by a dismissal of his appeal without cause, or for his negligence seemingly superinduced by this court. A failure to comply with the rule in appeals here-

Tate v. Hamlin et al.

after in this respect, and a failure to take action in appeals heretofore taken within ninety days after the announcement of this decision, may subject such appeals to dismissal under the rule.

Counsel interested in another appeal where the appellee is a nonresident, have supposed our former opinion held that service on an attorney of record is worthless. That is not the holding. The holding was, that service of notice on an attorney *alone* would not be good, even if it was that kind of notice authorized to be served on the attorney of the adverse party, because the provision authorizing such notice requires notice also to be served on the clerk. But counsel in the other case call our attention to the section providing for publication notice, where, as in their case, the appellee is a nonresident of the State. It reads as follows: "Whenever it shall appear to the supreme court, by satisfactory proof, that the appellee in a cause appealed after the close of the term, is not a resident of this state, and that a notice of the appeal cannot be served upon the attorney of record in the court below, the court may order that notice of the pendency of the appeal be given in some newspaper printed and published in this State, for three weeks successively; after which the court shall proceed in all respects as if the defendant had been served with process." Section 663, Burns' R. S. 1894 (651, R. S. 1881).

The meaning of this section is, that if the notice provided for in the section referred to in the former opinion cannot be given by reason of the nonresidence of the appellee, and that no service of the unofficial kind of notice can be got upon his attorney of record, notice may be given by publication. The two sections must be construed together. If the appellee is a nonresident of the State and service of notice cannot be got on his attorney of record, then neither kind of notice

Tate v. Hamlin *et al.*

of the appeal, as provided in section 652, Burns' R. S. 1894 (640, R. S. 1881), can be given. Because the appellee is out of the State and a summons cannot be served on him. The other kind, the unofficial notice, cannot be given because, as we before held, to make it complete, it must be served both upon the clerk of the trial court and the attorney of the adverse party. The meaning of the section just quoted is, that it must be shown that neither kind of notice provided for in the former section can be given before publication notice can be ordered.

When the appellee is shown to be a nonresident of the State, and that service of notice cannot be got on his attorney of record, then it is shown that neither kind of notice provided for in the former section can be given, even though notice may be served on the clerk; and then, and not till then, is the appellant entitled to an order for publication notice.

The petition is overruled.

TATE v. HAMLIN ET AL.

[Filed March 13, 1897. Rehearing denied Dec. 9, 1897.]

MORTGAGES.—Foreclosure.—Sales.—Priority.—A mortgage of an undivided one-half of certain real estate was foreclosed without making a senior mortgagee a party. The senior mortgage, covering all of the real estate, was foreclosed and the holders of the junior mortgage made defendants, and in the decree their mortgage was declared junior. Proceedings were afterward instituted by the mortgagors and said junior mortgagees to review the proceedings in foreclosure of the senior mortgage on the ground of an alteration of the note secured by such senior mortgage; the mortgagors failed in said proceeding, but the holders of the junior mortgage succeeded and obtained a judgment declaring the said foreclosure decree invalid and ordering the decree opened for further proceedings. The senior mortgagee bought in all of the land under his decree, and the junior mortgagees bought the undivided one-half of the land under their decree. The junior mortgagees afterward

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150 694

Tate v. Hamlin *et al.*

bought the whole tract of land at tax sales and judgment sales upon judgments in favor of persons who were defendants to and who were precluded by the decree in favor of the senior mortgagee, and went into possession of the entire tract of land. The wife of mortgagor bought the entire tract of land of the junior mortgagees, receiving a quitclaim deed and assignments of the certificates of purchase from the tax and judgment sales held by them. *Held*, that the senior mortgagee had no right or interest in the undivided one-half of the real estate covered by the junior mortgage by reason of the fact that he was not made a party to the foreclosure thereof; that the tax and judgment sales being invalid, mortgagor's wife had no interest or rights in the land other than that obtained by purchase from the junior mortgagees, and that she could not by reason of such purchase deny the validity of the lien of the senior mortgage as to the other half of the land. *pp. 108-115.*

PARTIES.—*Review.*—Where proceedings were instituted by mortgagors and junior mortgagees to review a foreclosure proceeding by a senior mortgagee, and during the pendency thereof a sheriff's deed is made to the senior mortgagee and his wife, the proceeding is properly continued in the name of the original parties. *p. 115.*

From the Marion Superior Court. *Reversed.*

S. M. Shepard, J. E. McCullough, H. N. Spaan, F. Knefler and J. F. Berryhill, for appellant.

W. V. Rooker, L. C. Walker and W. D. Bynum, for appellees.

HACKNEY, J.—This case is stated in a special finding of facts, with conclusions of law, rendered by the trial court and with exceptions reserved by the appellant. The facts found were, that in August, 1871, Jacob T. Wright and Carlin Hamlin executed to the firm of Dunn & Love a note for \$4,000.00, representing a part of the consideration for certain real estate sold by said firm to them, and as securing the same executed a mortgage of said real estate. In February, 1874, Dunn & Love transferred, by indorsement, said note to Tate. In January, 1877, Hamlin executed to one Hager a mortgage for \$1,500.00 on the undivided one-half of said lands, and Fletcher & Churchman

Tate v. Hamlin et al.

thereafter became the owners of said mortgage, which, in September, 1877, they had foreclosed, Tate not being a party to such foreclosure. On the 29th day of May, 1878, Tate obtained a decree of foreclosure of said mortgage first mentioned, Fletcher & Churchman being defendants, and their mortgage being adjudged junior. In June, 1878, Wright and Hamlin, by complaint, sought a review of Tate's decree, and in July, 1878, Fletcher & Churchman, by cross-complaint, sought review of said decree, the ground for review in each instance being the unauthorized alteration of said \$4,000.00 note, by striking out the condition in the attorney's fee clause, "if suit be instituted" on the note. On demurrers the complaint of Hamlin and Wright was held insufficient, and the holding was unappealed from, and the cross-complaint of Fletcher & Churchman was held sufficient, and that holding was affirmed upon appeal to this court. On the trial of the proceeding for review Fletcher & Churchman recovered against Tate and other defendants, and Tate recovered against Wright and Hamlin, the decree therein in favor of Fletcher and Churchman, declaring Tate's decree of May 29, 1878, to be invalid, and ordering the cause reopened for further proceedings. On the 29th day of June, 1878, Tate bought in on his decree all of said lands, and on the 27th day of July, 1878, Fletcher & Churchman bought in said undivided half of the lands on their decree of September 22, 1877. In June, 1884, Tate and his wife, Helen J. Tate, upon assignment of Tate's certificate of purchase, received a sheriff's deed for all of said lands. In February, 1876, all of said lands were sold to one Toohey for the delinquent taxes of 1874 and 1875 in the sum of \$222.55, and thereafter, prior to April 21, 1879, Toohey's certificate having been assigned to Fletcher & Churchman, he and they paid taxes on the lands in

Tate v. Hamlin et al.

the sum of \$423.05, and on the last named date they received an auditor's deed for said lands under said tax sale. Thereupon Fletcher & Churchman went into the possession of said entire lands, the rental value whereof has been \$500.00 per annum, and, in February, 1881, said lands were sold to them for \$161.64 for taxes delinquent in the years 1879 and 1880. Between the date of Tate's decree of foreclosure and the 19th day of February, 1881, Churchman purchased at sheriff's sales, at various times, each of the undivided halves of said lands upon judgments in favor of persons who were defendants to and were precluded by the decree in favor of Tate of May 29, 1878. On February 19, 1881, Catherine E. Hamlin bought the entire lands from Churchman, receiving a quitclaim deed and assignments of certificates of purchase under said decree in favor of Fletcher & Churchman, said several judgments, and the last mentioned tax sale, and she was then put in possession of lands. The agreed purchase price, \$6,000.00, was secured by mortgage, \$3,500.00 of which has been paid. Mrs. Hamlin received deeds upon said several certificates, and now holds said lands. The principal and interest on Tate's note was \$10,444.44 when the finding was made. His note had been "purposely altered by its then holder by crossing out and erasing therefrom the words if suit be instituted, in the clause relating to attorney's fees," without the knowledge of the makers or of Fletcher & Churchman. There was no evidence that Hamlin and Wright had no personal property at and before the time of said tax sales out of which the taxes could have been made, nor was there evidence of a demand upon them for such property.

This finding was made upon the original complaint by Tate, to foreclose his mortgage, with a supplemental complaint in two paragraphs setting up the

Tate v. Hamlin et al.

facts following his foreclosure decree, alleging a conspiracy between Fletcher & Churchman and Hamlin to make the several assignments, purchases, conveyances, etc., as found, to cheat and defraud Tate, and alleging that the Hager mortgage had been fully paid to Fletcher & Churchman, praying an accounting for rents, the cancellation of the Hager mortgage, and of the \$6,000.00 mortgage by Mrs. Hamlin, and for possession of the lands, and to quiet the title. Issues joined included the question of the alteration of said note of Tate for \$4,000.00. The case was tried upon the theory that the proceedings were in the original cause upon review.

The court found as conclusions of law upon said facts, as follows: (1) The alteration of the note was material; (2) the tax sales passed no title, but (3) they created a lien, now held by Mrs. Hamlin, for the purchase money and subsequent payments of taxes; (4) that no title was acquired upon the execution sales by Churchman, nor by Mrs. Hamlin, under those judgments whose creditors were defendants in Tate's foreclosure of May 29, 1878, and Churchman and Mrs. Hamlin acquired no rights thereunder as against Tate; (5) that Mrs. Hamlin acquired, under the foreclosure of the Hager mortgage, a valid title to an undivided one-half of the real estate; (6) Fletcher & Churchman have a valid lien for the balance of Mrs. Hamlin's mortgage to them upon all of the real estate, and (7) Tate is entitled to no relief against Fletcher & Churchman or Mrs. Hamlin.

Over motions by the appellant for a new trial and for a *venire de novo*, the trial court rendered judgment in accordance with the conclusions of law stated. The overruling of said motions and exceptions to the first, third, fifth, sixth, and seventh conclusions of law severally present the only questions discussed in this court.

Tate v. Hamlin et al.

No question is presented by the motion for a new trial which does not depend upon the evidence, and appellees insist that the evidence is not in the record, for the reason, among others, that it is not disclosed that the longhand manuscript of the evidence was filed in the clerk's office before it was embodied in and filed as a part of the bill of exceptions. The only evidence of the filing of said manuscript is an entry that the appellant filed "his bill of exceptions embodying the stenographer's official report of the evidence," etc., on the 4th day of March, 1891, and a special certificate of the clerk that the longhand manuscript contained in the bill was filed in his office on the 4th day of March, 1891. This is not sufficient, as has many times been held. *DeHart v. Board, etc.*, 143 Ind. 363; *City of Decatur v. Grand Rapids, etc., R. R. Co.*, 146 Ind. 577; *Hamrick v. Loring*, 147 Ind. 229; *Pruitt v. Farber*, 147 Ind. 1; *Carlson v. State*, 145 Ind. 650. The appellant was required to show a filing in the clerk's office before its filing as a part of the bill of exceptions, and from the record this duty is not discharged, but, from all that appears, the filing as a part of the bill may have been the only filing. No question, therefore, is presented by the motion for a new trial.

The case of the appellant presents no plausible claim to an ownership of or lien upon the undivided one-half of the lands covered by the Hager mortgage. The foreclosure, sale, and conveyance under that mortgage made a complete title in that proportion of the land, subject only to the claim of priority by Tate for his mortgage of the whole. The alteration of the Tate note, by the decision in *Tate v. Fletcher*, 77 Ind. 102, and by the decision in this case, the correctness of which is not denied, was an act defeating the lien of Tate's mortgage as against Fletcher & Churchman. Although Tate was not a party to the foreclosure of

the Hager mortgage, he is precluded by the holding that, as against it, his mortgage is no lien. We observe, therefore, no force in the claim of Tate in this case that he had the right to have found facts establishing the basis upon which he might redeem from the sale on the Hager mortgage, and there is certainly no strength in the claim that Tate was entitled to any interest in the undivided half of the land so covered by the Hager mortgage. The proposition that he held the title of Hamlin and Wright under his mortgage, they having been precluded by his foreclosure and the demurrer to their complaint for review, does not give force to the claim that Tate could still maintain an interest in the proportion of the lands covered by the Hager mortgage, for the foreclosure of the Hager mortgage and the sale thereunder, with the decision that Tate's mortgage was invalid as to that mortgage, swept away all possible claim of Tate to that interest, and included all right therein of Hamlin and Wright.

As to the remaining undivided one-half of the lands, any title of the appellee, Catherine E. Hamlin, must depend upon the tax deeds and the purchases under the judgments of those who were defendants to the suit of Tate to foreclose his mortgage. The right to review the decree in foreclosure was only sought on behalf of Fletcher & Churchman and Wright and Hamlin and their wives. That right, as we have seen, was denied to Wright and Hamlin and their wives upon the demurrer to the complaint in review, and that denial precluded them from the assertion of title as against the foreclosure. *Wright v. Churchman*, 135 Ind. 683. The trial court, in its fourth conclusion of law, recognized the rule that all parties, except those in whose favor review was granted, were bound by the decree of foreclosure. By that conclusion the trial

Tate v. Hamlin et al.

court held those to be precluded whose judgments were the basis of the sales made to Churchman. It remains, therefore, to determine the effect of the tax deeds. The trial court has decided that the deeds were not effective to convey title (second conclusion), but that the appellee, Catherine E. Hamlin, is entitled to a lien upon the lands (third conclusion). The appellee, in the brief of one of her counsel, concedes that the tax deeds carried no title and only secured a lien. There would seem, therefore, to be no plausible support to a claim of title in one undivided half of the lands, as against Tate, upon the tax deeds. Indeed, it would not appear doubtful that the tax lien, if any, would not stand for the whole sum against either undivided interest, but would obtain as against the whole.

We conclude that in no element of the case has Mrs. Hamlin support for a claim of title to the whole lands, or to more than an undivided one-half, that interest covered by the Hager mortgage. But it is urged in her behalf that, since she has an undivided interest in the whole, she may successfully deny the validity of Tate's mortgage, and that the court will not aid him in enforcing a forged instrument. That Tate acquired the title of Wright and Hamlin in the undivided one-half of the lands not covered by the Hager mortgage, by and through his foreclosure; that as to that interest Mrs. Hamlin was precluded by the foreclosure and the denial of a review; that any interest she may now assert therein must depend upon the tax lien, seem to be propositions about which there is no room for serious question. Upon the Hager mortgage and the deed thereunder Fletcher & Churchman could have claimed, in their cross-complaint for review, no more than the interest in the lands covered by that mortgage, and as to that source of title Mrs. Hamlin can

Tate v. Hamlin et al.

claim no more. Tate has title secured by legal methods; Mrs. Hamlin has no title, and claims to hold against Tate because the original owners, proceeding in time, might have defeated his title so secured. As to the interest not included in the Hager mortgage, Tate holds the title of Wright and Hamlin. As to that interest, Mrs. Hamlin cannot establish color of title through the Hager mortgage and the tax deeds, as correctly found by the trial court, gave only a lien, and not a title.

The issues tendered by the supplemental complaint were in the nature of an action to quiet title, and their sufficiency in that respect is not in question in this court. As a continuation of the proceedings in review, and counsel nowhere question that this proceeding was properly in continuation of the original suit on review, it was proper that the proceedings continue in the name of Tate, notwithstanding the sheriff's deed to Tate and wife. Section 272, Burns' R. S. 1894; *Roszell v. Roszell*, 105 Ind. 77; *Steeple v. Downing*, 60 Ind. 478; *Harvey v. Myer*, 9 Ind. 391.

The findings of fact do not include all of the lands described in Tate's complaint and mortgage, and there is no finding as to the amount owing to Mrs. Hamlin on account of taxes. The issues doubtfully, if at all, present any question, either as to the extent or the enforcement of a tax lien, or as to a set-off of rents against taxes, and we do not consider such questions.

The conclusions of the lower court in denying to Tate all interest in the lands, and in extending a lien upon the whole lands in favor of Fletcher & Churchman for the balance of their mortgage from Mrs. Hamlin were erroneous.

The judgment is reversed, and a new trial is directed, that the rights of the parties may be presented more distinctly by the issues.

BOARD OF COMMISSIONERS OF CASS COUNTY ET AL.
v. PLOTNER.

[No. 18,018. Filed December 10, 1897.]

DRAINS.—Assessment Liens.—Estoppel.—Where the owner of property assessed with benefits for a public ditch, under color of law, had notice of the petitions and assessments, and of the various steps as required by law for the construction of public ditches and made no objection or complaint against such proceeding, and during the progress thereof joined in a petition to the board of commissioners asking for an extension of time for the payment of the first installment of the assessments, which was granted, he cannot, after the completion of the ditch and after his receipt of benefits therefrom, deny the authority under which such improvements and assessments were made.

From the Pulaski Circuit Court. *Reversed.*

Gavin, Coffin & Davis, Nelson & Myers, McConnell & Jenkins, Guthrie & Bushnell and Borders & Borders, for appellants.

Elliott & Elliott, Kistler & Kistler and M. Winfield, for appellee.

HACKNEY, J.—This was a suit by the appellee, Plotner, against the appellants, the board of commissioners, the auditor, and the treasurer of Cass county, and the board of commissioners of White county.

In his complaint the appellee alleged his ownership of certain described lands in Cass county; that the appellants “unlawfully claim title to, interest in, and lien on said real estate, adverse to plaintiff’s rights, by reason of said defendants attempting to create a lien thereon by assessing and charging said real estate with certain supposed benefits in the establishing and constructing of what is known as the ‘Oliver Hendee Ditch’ in Cass county, State of Indiana, which claim and charge against said real estate is without right, and unlawful, and casts a cloud upon plaintiff’s title.”

149	116
149	801
151	404

149	116
157	500

149	116
180	9

149	116
1171	265

Board of Commissioners of Cass County *et al.* v. Plotner.

The prayer was that appellee's title be quieted against the claim of appellants, and that said claim be declared null and void.

The issue was formed by an answer in general denial, and, upon change of the venue from the Cass Circuit Court to the Pulaski Circuit Court, a trial resulted in a special finding with a conclusion of law in favor of the appellee, to the effect that the assessment against his lands for the construction of said "Oliver Hendee Ditch" was void, and that appellee's title should be quieted.

The ditch in question was constructed under and pursuant to the act of March 7, 1891 (Acts 1891, p. 455, section 5690 *et seq.*, Burns' R. S. 1894), was of more than five miles in length and extended into the counties of Cass and White.

The theory of the appellee, and that which it is conceded was followed by the trial court, is that section 15 of said act, section 5704, Burns' R. S. 1894, was and is invalid and ineffectual to create a joint tribunal, consisting of the boards of commissioners of two or more counties for the establishment and construction of drains over five miles in length, extending into two or more counties. The objection urged against the section is that no provision is made for a *time of holding* joint sessions, a *place for holding* such sessions, and a *mode of organization*, for any tribunal consisting of several boards.

The facts specially found recite, in detail, all of the meetings, proceedings, and orders of the boards of said two counties, from the original petitions to the respective boards down to and including the placing of the assessments of benefits upon the tax duplicates for collection. The facts disclose that the appellee had notice of the petitions, notice of the assessments, and of the various steps, as required by said act, rel-

Board of Commissioners of Cass County *et al.* v. Plotner.

ative to ditches in a single county, and knowledge of the issuance, by said counties, of bonds for large sums; that he lived upon his said lands and saw and knew of the construction of the ditch thereupon, as the same progressed; that he made no objection to or complaint against the proceeding, or the construction of the ditch as it affected his lands; that during the progress of the work he joined in a petition to the board of commissioners of Cass county, asking an extension of the time for the payment of the first installment of the assessments, and, pursuant to said petition, a delay of one year in the enforcement of the assessments was allowed by the treasurer of said county.

It appears, also, from the report of the viewers recited in the finding, that his lands were benefited by said ditch in the sum of one hundred and twenty dollars, the sum assessed against said lands; that the improvement was completed and accepted from the contractors who constructed the same, and the assessment was placed upon the tax duplicate of Cass county for collection.

Looking to the complaint, as the standpoint from which to view the special findings, it may be remarked that its character is not free from doubt. As an action to quiet title, it would seem to present an unusual, if not unauthorized, demand in that its purpose was to obtain relief from an assessment, not involving an adverse claim of title, one in which the defendants were mere ministerial officers, without capacity, as such, to assert or maintain a claim of title, or, indeed, to maintain a cloud upon titles to land, which land merely stands charged, under the forms of law, with assessments for public improvements. "Where the purpose of the action is merely to enforce or cancel a lien, incumbrance, or contract, the statute," as to new trials as a matter of right, "does not apply." *Liggett v. Hink-*

Board of Commissioners of Cass County *et al.* v. Plotner.

ley, 120 Ind. 387; *Williams v. Thames, etc., Trust Co.*, 105 Ind. 420; *Voss v. Eller*, 109 Ind. 260. The reason of the rule so stated is that such an action does not involve the claim of adverse title. While the complaint before us alleges an unlawful claim of title by the appellants, the specific averments characterize this general allegation as an attempt to charge the land with a lien for ditch assessments. If we should limit the purpose of the complaint to quiet title, in the ordinary sense, the findings would be subject to the objection that they do not state an adverse claim of title by the appellants. But, giving the complaint a more liberal interpretation, its object was to cancel, declare invalid, and stay the enforcement of an apparent lien in which the officers had only the interest of public servants, charged with the duty of collecting and enforcing for the benefit of others. In this view the pleading presented an appeal to the equitable powers of the court. It collaterally attacked the assessment as much as if an injunction had been asked, and the result sought was, in effect, to restrain the assertion or enforcement of the assessment as a lien.

Viewing the facts specially found from this standpoint, we are first led to inquire whether the appellee had the right to insist upon the invalidity of the section of the act in question, for, if he had not, we are not required to consider it. *Henderson v. State, ex rel.*, 137 Ind. 552, and authorities there cited.

It is a general rule, now fully accepted in this State, that where the owner of property subject to assessment for public improvements stands by and makes no objection to such improvements which benefit his property, he may not deny the authority by which the improvements are made, nor defeat the assessment made against his property for the benefits derived. And this is true, both where the proceedings for the

Board of Commissioners of Cass County *et al.* v. Plotner.

improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings. *Palmer v. Stumph*, 29 Ind. 329; *Hellkamp v. City of Lafayette*, 30 Ind. 192; *City of Evansville v. Pfisterer*, 34 Ind. 36; *City of Lafayette v. Fowler*, 34 Ind. 140; *Muncey v. Joest*, 74 Ind. 409; *City of Logansport v. Uhl*, 99 Ind. 531; *Peters v. Griffie*, 108 Ind. 121; *Taber v. Ferguson*, 109 Ind. 227; *Ross v. Stackhouse*, 114 Ind. 200; *Prezinger v. Harness*, 114 Ind. 491; *Western Paving, etc., Co. v. Citizens' Street R. R. Co.*, 128 Ind. 525; *McCoy v. Able*, 131 Ind. 417; *Vickery v. Board, etc.*, 134 Ind. 554; *Cluggish v. Koons*, 15 Ind. App. 599.

In *Vickery v. Board, etc.*, *supra*, the proceedings were attacked upon the ground that the law under which they were had was unconstitutional, and this court held that one who receives benefits under an unconstitutional law cannot deny the constitutionality of such law.

In *Cluggish v. Koons*, *supra*, it was held that proceedings under a law which had been repealed may not be attacked, as invalid, by one who has stood by and permitted his property to be benefited by such proceedings.

In *McCoy v. Able*, *supra*, it was said, "Principle and authority forbid that property-owners should be allowed to stand by, inactive and passive, until after the work has been done, and then come in and take from the contractor the value of his work and materials without compensation. For such persons the law has no very tender regard."

In *Ross v. Stackhouse*, *supra*, it was said, that "in any event, one who acquiesces, with knowledge, until after the improvement has been completed, cannot escape payment for the actual benefits received, even though the proceedings turn out to be void, provided the con-

tractor proceed in good faith and without notice from the property-owner. He cannot enjoy the benefits and escape the burden, unless he interferes or gives notice before the benefit is received."

In *Prezinger v. Harness*, *supra*, it was said: "The authorities fully justify the statement that, where an improvement is made under color of statutory proceedings, unless such proceedings are so totally and palpably void as that the person who made the improvement or performed the work must have proceeded with a degree of recklessness that amounted to bad faith, the property-owner who stood by and received the benefits assessed against his property will be estopped to assert the invalidity of the proceedings without first paying, or offering to pay, the benefits."

In answer to these authorities it is simply urged for the appellee that the case does not present the ordinary elements of an estoppel. Acquiescence is not always treated as an estoppel, but as a *quasi* estoppel, as it was called in *City of Logansport v. Uhl*, *supra*. It is a release or an abandonment of one's rights if, having rights, he stands by and sees another dealing with his property, in a manner inconsistent with such rights, and makes no objection while the act is in progress. *Duke of Leeds v. Earl of Amherst*, 2 Phil. Ch. 117. Acquiescence is like permission to do the thing done, and equity would treat as unconscionable the denial of that to which one has assented or acquiesced.

In this case, if section 15 of the act of 1891, *supra*, were invalid for lack of detail, a proposition to which we most certainly do not assent, it gave color of law for the proceeding affecting the appellee's land. That conclusion could not be stronger in establishing the invalidity of the proceedings than if the law had been repealed, or was unconstitutional. There is certainly no element of the case disclosing bad faith or a reck-

Board of Commissioners of Cass County *et al.* v. Plotner.

less disregard for the law by those who undertook to secure the improvement, or those who did the work.

The facts found show a clear and unmistakable case of acquiescence on the part of the appellee, even if this controversy were waged with the contractor who did the work. But the contractor is not a party, and the suit is waged against the officers who are but the instruments or agencies through which those interested have accomplished a public improvement with direct private benefit to the appellee. The theory upon which counties and cities issue bonds and secure money thereon to pay for such improvements and benefits is, not that such counties or cities are debtors or in any manner liable in the first instance, but that they represent the property owners, stand for them, and as their agents, and are the conduits through which the property owners secure the improvement, obtain time for payments, and pledge their property to the creditor, the bondholder. *Strieb v. Cox*, 111 Ind. 299; *Quill v. City of Indianapolis*, 124 Ind. 292; *Porter v. City of Tipton*, 141 Ind. 347; *Walker v. Board, etc.*, 11 Ind. App. 285.

The silence of the appellee was his acquiescence in the choice and in the act of his agent, an act with colorable authority, by one who, with his knowledge, acted for him and in his behalf. Now to permit him to deny the agency is to perpetrate a fraud upon the agent and upon the bondholders, whose good faith is not questioned. Equity will not tolerate such bad faith, and, when appealed to, with hands unclean from the receipt of benefits for which any return is denied, relief will be withheld.

We conclude, therefore, that the court erred in its conclusion of law, and the judgment is reversed, with instructions to restate its conclusion of law in accordance with this opinion, and to render judgment for the appellants thereon.

The Wayne, etc., Building and Loan Association v. Moats et al.

THE WAYNE INTERNATIONAL BUILDING AND LOAN
ASSOCIATION v. MOATS ET AL.

[No. 18,814. Filed December 10, 1897.]

MORTGAGES.—*Waiver of Priority by Senior Mortgagee.*—*Mechanic's Lien.*—Where a junior mortgagee, in consideration of a waiver of priority by the senior mortgagee, agrees that he will see that the money he advances is applied to the improvement of the property, but, in violation of his agreement, permits mechanics' liens to be obtained against the property, he will be obliged to satisfy such mechanics' liens out of his prior lien, and so protect the senior mortgagee. pp. 127, 128.

BUILDING AND LOAN ASSOCIATION.—*Scope of Agent's Authority.*—Where an agent of a building and loan association has authority to solicit applications for stock and to effect loans, it is within the scope of such agent's authority to bind the association by an agreement that the money advanced to a borrower should be used in the improvement of the mortgaged premises. p. 129.

LIENS.—*Junior Lien Holder.*—*Marshaling of Senior Liens.*—A junior lien holder cannot complain as to the order of marshaling liens senior to his own. pp. 129, 130.

MORTGAGES.—*Waiver of Priority by Senior Mortgagee.*—*Rights of Junior Mortgagee.*—Where a senior mortgagee waives his priority in favor of a junior mortgage for a larger amount, the junior mortgagee is subrogated to the rights of the senior mortgagee to the amount only of the senior mortgage. pp. 130, 131.

From the Marion Superior Court. *Affirmed.*

D. W. Howe and Morgan & Morgan, for appellant.

W. H. H. Miller, J. B. Elam and D. A. Myers, for appellee.

MCCABE, J.—The appellant sued the appellees to foreclose a mortgage on real estate, given by appellee Moats and wife to secure a bond executed to appellant by said Henry H. Moats for a loan of \$3,000.00.

Cross-complaints were filed by certain defendants, setting up and seeking to enforce against the same real estate liens of mechanics and materialmen, and judgment liens.

The Wayne, etc., Building and Loan Association v. Moats *et al.*

The issues made were tried by the court, resulting in a special finding of the facts, upon which the court stated conclusions of law, to the second of which the plaintiff, appellant, excepted. The court rendered judgment pursuant to the conclusions of law, and afterwards overruled appellant's motion to modify the decree. The second conclusion of law, and the refusal of the court to modify the decree are called in question by the assignment of errors. The refusal to modify presents no other question than that presented by the second conclusion of law, that being the only question before us on this appeal.

The substance of so much of the facts found by the court as are necessary for the decision of the question presented by the second conclusion of law, are that, on September 7, 1895, the defendant, William H. Perkins, sold and conveyed to the defendant, Henry H. Moats, a certain described lot in the city of Indianapolis, and on September 9, 1895, in consideration of said conveyance, said Moats executed to said Perkins four promissory notes of \$200.00 each, payable in one, two, three, and four years after the date thereof, with interest at six per cent. per annum, and at the same time executed a mortgage on said lot, in which his wife, Emma C., joined, to secure said notes, which mortgage, within forty-five days, was duly recorded in the recorder's office of Marion county; that afterwards, on November 18, 1895, the bond and mortgage sued on were executed by said Moats and wife to appellant upon said real estate to secure the payment of said loan of \$3,000.00, which mortgage was duly recorded in the same recorder's office within forty-five days; that afterwards, on November 30, 1895, said Perkins executed and caused to be entered of record upon the margin of the record of his said mortgage a waiver in the words and figures following: "I hereby waive the

The Wayne, etc., Building and Loan Association v. Moats et al.

lien of this mortgage and make it second and junior to the one executed by H. H. Moats to the Wayne International B. & L. Assn. for \$3,000.00. Nov. 30, 1895. Wm. H. Perkins. Attest: W. E. Shilling, R. M. C., by Benjamin Franklin, Dep." That said loan was made by said association for the purpose of enabling said Moats to erect a dwelling and appurtenant improvements upon said real estate, to the value of \$3,000.00, it being the intent of said Moats and said association that the improvements so erected, together with said real estate, should afford security for the amount of said loan and the amount due said Perkins, and that in consideration thereof the latter executed the waiver aforesaid. That Charles W. Phillips, agent of said association, in addition to the above, promised said Perkins, on behalf of said association, that the money so loaned should all be paid out for and on account of labor and material used in constructing said improvements, and that he would, for and on behalf of said association, see that said money was so applied and that all such accounts were paid. Said agreement being made prior to said waiver and in consideration thereof. That prior, and at the time of the execution of said mortgage to plaintiff, said agent Phillips was located in Indianapolis, and his duties as such agent as authorized by plaintiff and as usually exercised by him in course of his agency, were to solicit applications for stock, take applications for loans, and submit them to the home office of the plaintiff for approval, and make monthly collections. When money was remitted to an applicant for a loan, it was by check, payable to such applicant, mailed to said Phillips, and by him delivered to the applicant. The plaintiff had given Phillips no other or different authority than as herein stated. It was through him, as such agent, that plaintiff's loan was effected. Afterwards,

The Wayne, etc., Building and Loan Association v. Moats et al.

relying upon said waiver, said plaintiff advanced to said Moats upon said loan the sum of \$2,600.00, all of which was paid to said Moats, except the sum of \$600.00 which was paid to the Russell Lumber Company for materials furnished by it for improvements hereinafter mentioned, and which plaintiff was compelled to pay to prevent said company from filing and enforcing a mechanic's lien and in order to protect the lien of its mortgage. Shortly after the execution of the mortgage by Moats and wife, said Moats began the erection of a dwelling house, barn, and out house upon the real estate hereinbefore described, to wit, about December 10, 1895, but about May 1, 1896, and before the completion of said house, said Moats abandoned work thereon, and other improvements, which were not completed. That said Moats paid out for labor and material used therein about \$900.00, including said \$600.00 paid to the Russell Lumber Company.

The court finds all the facts necessary to constitute three several mechanics' liens on said real estate, incurred in the erection of said dwelling, all of which had been assigned to the cross-complainant, Gardner, dated December 17, 1895, January, 1896, and January 8, 1896, aggregating \$155.13. There being no question about these liens and dates thereof, or amounts, the facts are omitted.

The court found the following judgments recovered against said Moats, and that they, at the time of the recovery of each, became liens on said real estate, with dates, amounts, and names of judgment creditors: Boothby, November 2, 1895, for \$390.00; Aufderheide & Zumpfe, November 11, 1895, \$71.70; Florea & Seidensticker, November 16, 1895, \$79.59; which last judgment is owned by John Furnas.

The material used and labor performed in the erection of said dwelling house were of the value of

The Wayne, etc., Building and Loan Association v. Moats et al.

\$875.00. It would have required work and material to complete said dwelling of the value of \$600.00 at the time it was abandoned, and now of the value of \$700.00, and if completed said dwelling would be worth \$2,000.00. The value of the materials and labor used in the erection of the barn and out house were and are of the value of \$125.00. The value of the lot was and still is \$1,000.00. There are no other liens upon said property. The total amount due the plaintiff from Moats is \$3,151.68. There is now due from Moats to Perkins on the first note, principal and interest, \$220.41; and on the amount that will be due on maturity of each of the other notes to Perkins from Moats is stated. And the principal and interest of all of said notes from Moats to Perkins to this date is \$875.41. There is due the plaintiff for costs of protecting said dwelling against the weather after its abandonment by Moats, \$44.50. And there is due Perkins for taxes paid on the property \$1.50. .

The second conclusion of law is: "That the proceeds arising from the foreclosure sale should be applied as follows: (1) To cost and accruing costs; (2) to the plaintiff, \$44.50; (3) to cross-complainant Perkins, \$1.50; (4) to the payment of the amounts due upon mechanics' liens set forth in the foregoing finding, \$155.13; (5) to the plaintiff, \$720.28; (6) to the amounts due on the judgments set forth in the foregoing finding of facts, to wit: the judgment of Arthur L. Boothby, \$390.00; Aufderheide & Zumpfe, \$71.70; John Furnas, \$79.59; (7) to the plaintiff, \$24.00; (8) to the cross-complainant Perkins, \$220.41, now due, with other sums to become due as hereinafter found; (9) to the plaintiff, \$2,406.81; (10) the residue, if any, to be paid into the office of the clerk of this court to abide the further orders thereof."

There would be no difficulty in determining the

The Wayne, etc., Building and Loan Association v. Moats *et al.*

priorities of the various liens had there been no agreement waiving and changing some of the priorities with the agreement incidental thereto. The only objection urged against the priorities as fixed by the trial court relates to the first application of the proceeds of the foreclosure sale to the plaintiff's debt. The trial court, in its marshaling of the liens, places the mechanics' liens first, \$155.13, excepting the cost of the proceeding and two other small items falling in the same category—taxes paid by Perkins, \$1.50, and costs of protecting the abandoned and unfinished house from the weather, paid by appellant, \$44.50. The superior court places next in the order of priority \$720.28 to be paid to the plaintiff. But plaintiff contends it ought to have been \$875.41, an amount equal to the Perkins mortgage, the priority of which was waived and yielded to and in favor of the plaintiff's mortgage. But the facts found show, that at least a part of the consideration of that waiver was the agreement of the plaintiff, through its agent Phillips, who effected the loan, to see to it that the money loaned should be applied to the construction of the dwelling and appurtenant buildings on the real estate in question, so as to protect it from mechanics' and materialmen's liens thereon in the construction of said buildings, in order to preserve Perkins' mortgage security, which, by the agreement, became second to the appellant's mortgage, in priority. And it further appears that the breach of that agreement on the part of the appellant resulted in fastening the mechanics' liens on the property, and in placing them ahead of both mortgages. And the trial court deducted the amount of those liens, viz.: \$155.13, out of the \$875.41, the amount of the Perkins mortgage, the priority of which, by the waiver mentioned, was given to the plaintiff's mortgage. That deduction leaves the amount, \$720.28, the first application of the

The Wayne, etc., Building and Loan Association v. Moats *et al.*

proceeds of the sale, to be made to plaintiff's mortgage. Such a deduction in just such a case was upheld by our Appellate Court in a most careful and well considered opinion in *Thorpe Block Saving and Loan Association v. James*, 13 Ind. App. 522.

But it is insisted that the contract of Phillips, the appellant's agent, was void in so far as it purported to bind appellant to see to the application of the loaned money to the payment of the expenses of the construction of the dwelling and buildings mentioned, because beyond the scope of his authority. However, appellant seeks to hold that part of the agreement good and binding which waived the priority of Perkins' mortgage in favor of, and to make appellant's mortgage prior to it. Unless appellant can hold that part of the agreement intact, valid, and subsisting, it is in a much worse condition than that in which the court has placed it in the marshaling of the liens. The facts found, we think, are amply sufficient to show that appellant's agent, Phillips, had authority to make both parts of the agreement on its behalf, as well as that part alone which is favorable to the appellant. The whole related to the act of effecting the loan. Besides, it would be monstrous to permit appellant to hold the consideration yielded to it for its agreement to secure the proper application of the loaned money, and yet hold that agreement void for want of authority in its agent to bind it by such stipulation.

Appellant further contends that the conclusion was wrong in not placing the judgment liens next to the payment of the costs and mechanic's liens, as we understand its contention. That, however, could not benefit appellant, but would positively injure it by placing it \$541.29, the aggregate amount of the judgment liens, farther off from the money to be distrib-

The Wayne, etc., Building and Loan Association v. Moats et al.

uted down the line of the procession of the marshaled liens. If any one had a right to complain of the court's marshaling on that point it would be either Perkins or the holders of the judgments. The judgment liens are next in priority to the Perkins mortgage and the mechanics' liens, and neither the judgment lien holders or Perkins are here complaining. The mechanics' liens in this case were only prior to some of the liens, so far as the buildings were concerned, and not as to the land; but by common consent of all parties, in view of the excess in value of the buildings over the amount of the mechanics' liens, they have been treated as prior in respect to both land and buildings. The judgments, however, have been placed by the court next in line of priority to the payment of the balance of the Perkins priority, equitably assigned to appellant by the waiver, after deducting the loss occasioned by its breach of duty, namely: \$720.28. Whether or not that was the proper place in the line for the judgments, we do not here decide, as it is not questioned by either the judgment lien holders or Perkins, and the appellant has no right to complain because its mortgage was junior thereto.

However, appellant's learned counsel take another tack against the order of the liens as marshaled by the court. They contend that by the Perkins waiver in appellant's favor, it not only obtained priority to the amount of the Perkins mortgage, \$875.41, but that it obtained a priority over all liens junior to the Perkins mortgage to the full extent of its loan of \$3,000.00, or so much thereof as it actually furnished to Moats.

But that would be a strange doctrine, indeed; a doctrine, it is believed, to which no court, either of law or equity, ever yet gave its assent. The terms of the waiver were simply to make the Perkins mortgage second to appellant's mortgage, and, in equity, it is

Helwig v. Beckner.

held that the appellant would be subrogated to the rights of Perkins to the amount of his mortgage, and, after that, postponed. *Raleigh National Bank v. Moore*, 94 N. C. 734; *Spaulding v. Crane*, 46 Vt. 292; *Thorpe Block Saving and Loan Association v. James*, *supra*, and cases there cited.

If appellant's contention on this point could be maintained, it would result not only in making appellant's junior mortgage senior to Perkins' mortgage, and clothing the appellant with the priority of the Perkins mortgage, but it would also make the agreement effective to bring up the rank of appellant's mortgage in seniority ahead of the judgment liens, all of which were actually prior and superior to appellant's mortgage. This would be putting it in the power of two lien holders, by contract between themselves to displace the liens of all other lien holders on the same property without the knowledge or consent of such other lien holders. There was no error in the conclusions of law. The judgment is affirmed.

HELWIG v. BECKNER.

[No. 17,943. Filed April 1, 1897. Rehearing denied Dec. 10, 1897.]

MALICIOUS PROSECUTION.—Complaint.—A complaint in an action for malicious prosecution must aver that the defendant acted maliciously and without probable cause. *p. 132.*

SAME.—Probable Cause, a Question of Law.—Where a special verdict is returned in an action for malicious prosecution, the question of the probable cause for the prosecution complained of is not a fact to be found by the jury, but a question of law to be determined by the court. *p. 133.*

SAME.—Malice a Question of Fact.—In an action for malicious prosecution, malice is a question of fact to be submitted to and found by the jury, and without proof of malice the action cannot be maintained. *p. 133.*

SAME.—Inference of Malice from Want of Probable Cause.—The court or jury trying an action for malicious prosecution may infer malice from want of probable cause, but are not required to do so. *p. 133.*

149	131
148	466
151	338
149	131
167	547

Helwig v. Beckner.

SAME.—Special Verdict.—No Finding of Malice.—Where there is no finding of malice in a special verdict returned in an action for malicious prosecution, such verdict will not support a judgment for the plaintiff. p. 133.

SAME.—Malice.—Evidence.—An acquittal of defendant of the crime charged is not *prima facie* evidence that the prosecution was malicious. p. 134.

SPECIAL VERDICT.—Conditional Conclusion.—The conditional conclusion of a special verdict, finding for the plaintiff if the law is with the plaintiff, otherwise finding for the defendant, is not absolutely necessary to the validity of the special verdict; and this part of the verdict cannot be considered by the court in determining whether the law on the facts found is with the plaintiff or defendant. p. 135.

From the Marion Superior Court. *Reversed.*

W. H. H. Miller, F. Winter, J. B. Elam, and Charles E. Averill, for appellant.

Thomas Hanna, G. W. Galvin and William Irvin, for appellee.

MONKS, J.—Appellee brought this action against appellant to recover damages for malicious prosecution. The jury returned a special verdict, on which appellant moved for a judgment in his favor, which motion the court overruled and rendered judgment thereon in favor of appellee. The errors assigned call in question the action of the court in overruling appellant's motion for a judgment in his favor, and in rendering judgment in favor of appellee.

It is insisted by appellant that the special verdict is not sufficient to support a judgment in favor of appellee, for the reason that the jury failed to make any finding upon the question of malice.

The complaint charges that appellant caused appellee to be indicted for larceny and embezzlement, and alleges that, in so doing, appellant acted maliciously and without probable cause. Each of these averments was essential in order to make a good complaint.

Helwig v. Beckner.

Terre Haute, etc., R. R. Co. v. Mason, 148 Ind. 578; *Seeger v. Pfeifer*, 35 Ind. 13; *McCullough v. Rice*, 59 Ind. 580, 584; *Paddock v. Watts*, 116 Ind. 146, 149; *Richter v. Koster*, 45 Ind. 440, 444; *Galloway v. Stewart*, 49 Ind. 156; *Lacy v. Mitchell*, 23 Ind. 67; *Stancliff v. Palmeter*, 18 Ind. 321; *Workman v. Shelly*, 79 Ind. 442, 445; *Schoonover v. Reed*, 66 Ind. 598; *Strickler v. Greer*, 95 Ind. 596, 597; *Uppinghouse v. Mundel*, 103 Ind. 238, 241; 1 Jaggard on Torts, 624.

What constitutes probable cause is a question of law, for the court to determine. Where a special verdict is returned, the jury must find the facts; and upon the facts found the court must, as a matter of law, decide whether there was probable cause. *Pennsylvania Cö. v. Weddle*, 100 Ind. 138, 144; *Cottrell v. Cottrell*, 126 Ind. 181, 184.

Malice, however, is a question of fact to be submitted to and found by the jury, and without proof of malice the action cannot be maintained; nor does the law infer malice from the want of probable cause. *Newell v. Downs*, 8 Blackf. 523; *Wilkinson v. Arnold*, 11 Ind. 45; *Ammerman v. Crosby*, 26 Ind. 451; *Oliver v. Pate*, 43 Ind. 132; *Strickler v. Greer*, *supra*.

The court or jury trying the cause may, however, as a matter of fact, infer malice from the want of probable cause, but are not required to do so, as such inference does not necessarily follow from the want of probable cause. *Newell v. Downs*, *supra*; *Wilkinson v. Arnold*, *supra*; *Ammerman v. Crosby*, *supra*; *Oliver v. Pate*, *supra*; *Richter v. Koster*, *supra*; 1 Jaggard, Torts, 624.

It is clear that, in an action for malicious prosecution, malice is a question of fact. It must be alleged in the complaint, and established by the evidence, and when a special verdict is returned, it must be

Helwig v. Beckner.

found as a fact by the jury; and, where there is no finding of malice, such verdict will not support a judgment for the plaintiff in such action. Even though the facts found in a special verdict show the want of probable cause, yet neither this nor the trial court can infer malice therefrom, as that inference can only be drawn by the triers of the facts. *Ammerman v. Crosby, supra*; *Oliver v. Pate, supra*.

Appellee insists that the final termination of the criminal case in favor of appellee, which was found in the special verdict, was *prima facie* evidence of malice. Such is not the law in this State. *Bitting v. Ten Eyck*, 82 Ind. 421, 424; 42 Am. Rep. 505; 14 Am. and Eng. Ency. of Law, 65. See, also, *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85; *Griffis v. Sellars*, 2 Dev. & B. (N. C.) 492, 31 Am. Dec. 422; *Heldt v. Webster*, 60 Tex. 207; *Williams v. Vanmeter*, 8 Mo. 339, 41 Am. Dec. 644; *Stone v. Crocker*, 24 Pick. (Mass.) 81; *Brown v. Lakeman*, 12 Cush. 482; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554; *Grant v. Deuel*, 3 Rob. (La.) 17, 38 Am. Dec. 228; *Staub v. Ben-thuysen*, 36 La. Ann. 467.

But if the law were as claimed by appellee, and the finding of the termination of the criminal cause in favor of appellee was *prima facie* evidence of malice, this court is not authorized to infer malice from such finding, for the reasons, as we have shown, that malice is not a question of law for the court, but of fact for the jury to determine. Besides, the settled rule is that the special verdict must find facts and not the evidence. *Gordon v. Stockdale*, 89 Ind. 240, 244.

The conditional conclusion to the special verdict, finding for the plaintiff if the law on the facts found is adjudged to be in his favor, otherwise finding for the defendant, is not absolutely necessary to the validity of a special verdict; and this part of the verdict cannot

Helwig v. Beckner.

be considered by the court in determining whether the law, on the facts found, is with the plaintiff or defendant. *Hendrickson v. Walker*, 32 Mich. 68; *Louisville, etc., R. W. Co. v. Lucas*, 119 Ind. 583, 584; *Evansville, etc., R. R. Co. v. Taft*, 2 Ind. App. 237, 242.

There is no finding in the special verdict that appellant, in causing appellee to be indicted, acted maliciously. As the burden of proof as to the allegation of malice was upon appellee, that fact must be considered as found against him and in favor of appellant. *Fisher v. Louisville, etc., R. W. Co.*, 146 Ind. 558. Such fact being found against appellee and in favor of appellant, the court should have sustained appellant's motion and rendered a judgment in his favor.

Under the rule concerning special verdicts, that nothing can be taken or added by inference or intendment (*Fisher v. Louisville, etc., R. W. Co.*, *supra*), it is perhaps true, as urged by appellant, that the facts found in the special verdict do not, as a matter of law, show the want of probable cause; but it is not necessary to determine this question, as the case must be reversed for the reason already given.

Judgment reversed, with instructions to sustain appellant's motion and render judgment in his favor against appellee on the special verdict.

PER CURIAM.—Upon a reconsideration of the record we have reached the same conclusion as in the original opinion, that the judgment should be reversed; but we think that justice required that instead of directing judgment on the special verdict, that a new trial should be awarded. The petition for a rehearing is therefore overruled, and it is ordered that a new trial be awarded, and that the mandate heretofore entered be modified accordingly.

Pearce et al. v. Dill.

PEARCE ET AL. v. DILL.

[No. 17,885. Filed December 14, 1897.]

LIS PENDENS.—*Banks and Banking.*—Where a bank pays out money on deposit after notice of a suit contesting the ownership thereof, it does so at its peril. pp. 141, 142.

TRUSTS.—*Recovery of Trust Funds Wrongfully Diverted.*—Whenever any property or fund in its original state has been impressed with the character or nature of a trust, no subsequent change of its original form or condition can divest it of its trust character so long as it is capable of being identified, and the beneficiary thereof may pursue and reclaim it regardless of the form into which it may have been changed, provided it has not gone into the possession of a bona fide purchaser without notice. p. 142.

SAME.—*Recovery of Trust Funds Wrongfully Diverted.*—*Identification.*—Where trust funds consisting of money have been wrongfully diverted, the *cestui que trust* may reclaim same, although not able to trace the identical coins or bills, where the identity thereof as a fund can be ascertained. p. 142.

SAME.—*Recovery of Funds Wrongfully Diverted.*—*Options.*—*Banks and Banking.*—Funds on deposit in bank which have been checked out by the husband of the depositor in settlement of illegal deals in options, and placed to the credit of the broker, may be recovered from the bank by the depositor, where the husband had no authority to draw checks on such deposit except in transaction of the depositor's business and for her use, of which the broker and bank had notice, and where the bank had notice of the nature of the deals for which the checks were given. pp. 143, 144.

SALES.—*Options.*—*Gaming.*—*Bucket Shops.*—Sales of products which, by the mutual understanding of the buyer and seller, are not to be delivered, but when the time fixed for delivery arrives settlement is to be made upon the basis of the market value of such products, understood by the parties to be a speculation solely on chances, are illegal and void. p. 144.

PRACTICE.—*Harmless Error.*—*Statute Construed.*—A judgment which is manifestly right under the evidence will not be reversed on account of erroneous intervening rulings. p. 145.

From the Montgomery Circuit Court. *Affirmed.*

Benjamin Crane, Albert B. Anderson, Charles Johnston and William H. Johnston, for appellants.

G. W. Paul and Henry D. Van Cleave, for appellee.

140	136
153	51

149	136
158	236

149	136
165	258
165	511
165	607

JORDAN, J.—By this action the appellee invoked the equity powers of the court to restore to her a certain amount of money which is charged to have been unlawfully diverted by her agent and trustee and placed to the account of appellant, Pearce, in the First National Bank of Crawfordsville, Indiana, a co-appellant herein. The complaint is in four paragraphs. The second substantially alleges that during the months of May, June and July, 1895, the plaintiff, Aravella Dill, was the owner of a certain amount of money, to wit, \$5,000.00, on deposit in said bank in her own name, and that she had a pass book given her by the bank, showing her said deposits as entered therein, and that her husband, E. S. Dill, had the custody of said pass book as her trustee and agent; that the defendant, Alfred Pearce, had and occupied a room in the city of Crawfordsville, Indiana, for the purpose of gaming and wagering in margins and option deals, and for the purpose of betting and wagering on the market price of wheat, corn, oats, and other produce; that the defendant had his said room and place of business supplied with a telegraph instrument, blackboards, etc., and other paraphernalia usually belonging to a "bucket shop," for the purpose of gaming and wagering upon the market price of wheat, corn, oats, and other products; that in fact the room and place of business was a "bucket shop" operated for the purpose of gaming and wagering on the rise and fall of the market price of wheat and other cereals. It is further shown by the averments of the complaint that her said husband and agent, E. S. Dill, patronized the defendant, Pearce, in said business, by betting and wagering with him on the rise and fall of the market price of wheat, corn, oats, and pork; that Pearce would sell to said Dill, and the latter purchase from him, option deals in wheat, corn, oats, and pork, to be set-

Pearce et al. v. Dill.

tled, and which in fact were settled, on the rise or fall in the future in the price thereof in the Chicago market; that in making said gaming deals with Pearce, said E. S. Dill, in order to pay the margins and losses therein, drew checks on the defendant, the bank, in favor of Pearce, and signed the plaintiff's name thereto as follows: "Aravella Dill, per E. S. Dill;" that these checks were delivered by Dill to Pearce and the latter endorsed the same and presented them to said bank and it honored each of them and gave Pearce credit in his account with the amount of each check and charged the amount against plaintiff's account in the bank, thereby transferring from her account or deposit in the bank to Pearce's account or deposit therein the sum of \$4,700.00, all of which it is alleged was unlawful and without her knowledge or consent. It is further alleged that the plaintiff had authorized the bank to honor checks drawn by her said husband, E. S. Dill, in her name in the transaction of her business, and that the bank is made a party defendant for the reason that it has the custody of said money or funds. It is alleged that the checks were invalid and did not authorize the bank to transfer her money to the account of Pearce, and that each of the defendants knew that E. S. Dill was her agent, and that all of said deals by him in "margins" and "futures" were made in his own name and for himself, and that he had no right or authority from plaintiff to draw said checks for said purpose, and that the money so taken from plaintiff's account by the means aforesaid was taken from her without any consideration whatever, and without her knowledge or consent. It is also averred that Pearce is insolvent and that the sum of \$2,677.38 of plaintiff's said funds is still in the bank credited to the account of the defendant, Pearce, and that the defendants have and hold said sum of money

as her trustee and for her use and benefit, and that in justice and equity she has the right to have the same restored and transferred to her bank account; and she asks the court to compel the defendants to restore the money to her bank account, etc., and for all other proper and equitable relief. The other paragraphs of the complaint allege facts which are similar to those set forth in the second.

A trial by the court resulted in a finding in favor of the plaintiff, and it was adjudged and decreed that at the time this suit was commenced there was on deposit in the said bank, the sum of \$2,677.77 in the name of the defendant Pearce, and of this amount the sum of \$1,607.00 was wrongfully transferred from the bank account of the plaintiff to that of the defendant, Pearce, by means of the checks set forth in the complaint, and that the defendant bank was the custodian of said fund and money, and each of the defendants then held and had, and now has and holds said sum of \$1,607.00 in trust for the plaintiff as for money had and received to her use, and the same belongs to her in her own right, etc.; and it was further ordered and decreed that the said defendants pay into court for the use of the plaintiff, said sum of \$1,607.00 within ten days, etc. A separate motion for a new trial was filed by each of the defendants, and overruled, and each separately assign errors in this court.

No question is raised in regard to the sufficiency of the complaint, appellants basing their claims for a reversal of the judgment upon the insufficiency of the evidence, and other alleged erroneous rulings of the trial court. Accepting as we must, the evidence which the trial court deemed most worthy, and it sustains, among others, substantially the following facts: The appellee is the wife of E. S. Dill, and in the spring and summer of 1895, at different times, she deposited in

Pearce et al. v. Dill

her own name in the First National Bank of Crawfordsville, Indiana, money owned and held by her to the amount of \$5,000.00 and over. At the time she opened her account with the bank, it was understood between her and the bank that the latter might honor checks drawn by her husband, E. S. Dill, in her name. She received a pass book from the bank, which she placed in the custody of her husband, who was acting as her agent in transacting her business, and as such he had authority to draw checks on her deposits in her name, for her use. Appellant Pearce operated and carried on in the city of Crawfordsville, Indiana, what is commonly known and denominated a "bucket shop" and was engaged in dealing in "margins," "futures" and "options" in wheat, corn, oats, and pork. The deals made by persons who patronized Pearce in his said business depended upon and were settled on the future rise or fall of the market price of the products sold and purchased, at the city of Chicago, Illinois, at the time fixed for their delivery. No grain or other products were delivered by Pearce to his customers, nor were any sold or purchased with such intention. After Mrs. Dill deposited her money in the bank, her agent, E. S. Dill, transacted and carried on with Pearce a series of deals by buying "options" or "futures" in wheat, corn, oats, and pork. Dill had no use for any of such products, and it was understood by him and Pearce, and so intended by both, that no wheat or other products sold by Pearce to Dill were in any manner to be delivered to him, but that the settlements therefor were to be made on the future rise or fall of the market price of the same at the city of Chicago. From time to time, during these transactions between Dill and Pearce, the former, without the knowledge or consent of the appellee, and without any authority from her, drew

checks in her name against her said bank account in favor of Pearce, to pay him for the "futures" so purchased, and to pay for losses sustained by Dill in such deals. To all of these checks the name of appellee was signed by her husband without her knowledge, consent, or authority, as follows: "Aravella Dill, by E. S. Dill." Appellee had nothing to do in regard to any of these transactions between her husband and Pearce, and the same were wholly between the two latter. Pearce knew that the money in the bank upon which the checks were drawn in his favor belonged to Mrs. Dill, and was on deposit therein in her name. He presented the checks so received from Dill from time to time to the bank, endorsed by him, and it honored the same and gave him credit on his account or bank deposit for the amount of each and all of the checks, and charged the same to the account of the appellee, which resulted in the bank transferring in the aggregate from Mrs. Dill's deposit or account to that of Pearce's the amount of \$4,700.00. Pearce and E. S. Dill, at and before the commencement of this action were both insolvent. There is also evidence tending to show that the bank, through its officers, had knowledge of the business in which Pearce was engaged at the time it honored the checks in question, and that they were given in payment and settlement of the said deals in "futures." At the time of the beginning of this suit Pearce had on deposit in the bank, in his own name, \$2,677.77, which amount was composed in part of the funds of appellee, at least of an amount equal to that recovered by her. It will be seen that no rights of innocent parties under the facts are involved. The only interest which the bank can be said to have in the controversy is that of having the question over the title or right to the money judicially determined between Mrs. Dill and Pearce. If the bank, as claimed,

Pearce et al. v. Dill.

paid out part of the money in dispute, on the checks of Pearce after the commencement of this action, it did so at its peril, and must suffer the consequences, so far, at least, as appellee is concerned.

- The insistence of counsel for appellee is that E. S. Dill, the agent of their client, committed a breach of trust and wrongfully diverted the money of his principal into the hands of the appellant, Pearce, and that she has the right, under the facts and the law applicable thereto, to trace it into Pearce's bank account, to which it had been transferred, and have it restored to her by the court as her property. The authorities generally affirm and support the right of a *cestui que trust* to pursue and recover trust funds wrongfully diverted, where their identity has not been lost, and where they have not passed into the hands of parties for value without notice of the trust. Whenever any property, or fund, in its original state, has once been impressed with the character or nature of a trust no subsequent change of its original form, or condition, can divest it of its trust character, so long as it is capable of being identified, and the beneficiary thereof may pursue and reclaim it, regardless of the form into which it may have been changed, provided it has not gone into the possession of a *bona fide* purchaser without notice. All that the law contemplates by requiring the property or fund to be identified is a substantial identification, and, in case the fund consists of money, the *cestui que trust* may reclaim it, although not able to trace the identical coins or bills, so long as its identity as a fund can be ascertained. It is a well-settled principle that the abuse of a trust fund by a trustee, or fiduciary, confers no right upon him, nor upon those who claim in privity with him. Where the fund has been misapplied, or converted into other

property, or mixed with the funds of the trustee, or of those claiming through him, and can be traced and identified, courts will attribute the ownership to the *cestui que trust*, and will not permit the wrongful act of the trustee, or fiduciary, in mixing the trust fund with his own funds, or those of a third party, to defeat a recovery, but, in general, in such cases, will separate the trust fund from the others with which it has been commingled, and restore it to the beneficiary entitled to receive it. *Bevis v. Heflin*, 63 Ind. 129; *Bundy, Rec.*, v. *Town of Monticello*, 84 Ind. 119; *Riehl v. Evansville Foundry Association*, 104 Ind. 70; *Orb v. Coapstick*, 136 Ind. 313; *Shepard, Tr., v. Meridian Nat'l Bank, post*, 532. See, also, the many leading authorities collected in a note to the case of *Union National Bank v. Gochtz*, 138 Ill. 127, 32 Am. St. 119, on p. 125, 27 N. E. 907.

The rule is, when the right to pursue and reclaim a trust fund exists, that the true owner thereof, when the fund is traced to the possession of another and identified, has the right to have it restored to him, not as a debt due and owing to him, but for the reason that it is his property, wrongfully diverted and withheld; and it can make no difference in regard to the right of recovery in such a case, whether the fund has been traced into the possession of a single individual, or into the hands of a firm or association composed of many persons, or into the form of a bank account. *In re Hallett's Estate and Knatchbull v. Hallett*, L.R. 13 Ch. Div. 696; *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497, 14 Am. St. 332; *National Bank v. Insurance Co.*, 104 U. S. 54.

The evidence, as we have seen, discloses that Dill was the agent of the appellee, and only authorized to draw checks upon her money in the bank, for her use, or in her business. The relation between him and the

Pearce et al. v. Dill.

appellee was of a fiduciary character, and in the use of her money in this respect he occupied the position of a trustee, and in the event that he wrongfully diverted or misapplied such funds, the rules relating to the pursuit and recovery of a trust fund apply. *Riehl v. Evansville, etc., Association, supra*; *Roca v. Byrne*, 145 N. Y. 182, 45 Am. St. 599, 39 N. E. 812.

The evidence fully proves that the appellant Pearce was operating what is commonly denominated a "bucket shop;" in fact, this is established by his own admissions on his cross-examination. He was engaged in conducting the illegal business of selling "futures" or "options." The products which he pretended to sell to his customers, he did not have at the time, and it was mutually understood and intended by both parties that the wheat or corn which was claimed to be sold and purchased was not to be delivered, but when the time fixed for its delivery arrived, the market value at Chicago of such cereals should constitute the basis upon which the settlements would be made. As the market price would rise or fall, there would be a loss or gain to the purchaser. The deals or transactions were understood to be a speculation solely on chances, and were in contravention of, and hostile to public policy, and therefore illegal. Such transactions are of like character and akin to bets made on a game of poker or faro, and are equally as uncertain and hazardous. The business or operations of the "bucket shop," have been the source of much evil. Embezzlements and other crimes on the part of public officers, and bank officials, having the custody of money belonging to others, have been in the past some of the evil fruits directly traceable to dealing in futures in these institutions; and the question of prohibiting such transactions or business, as it is generally conducted, merits the consideration of

Pearce et al. v. Dill.

the legislature. Such dealings as those in which Pearce and the husband of the appellee engaged have repeatedly been condemned as illegal by the decisions of this court. *Whitesides v. Hunt*, 97 Ind. 191; *Sondheim v. Gilbert*, 117 Ind. 71; *Davis v. Davis*, 119 Ind. 511; *Plank v. Jackson*, 128 Ind. 424.

To summarize, in conclusion, the agent of the appellee is shown to have abused his trust by wrongfully diverting the money of his principal into the hands of Pearce, for an illegal consideration. The latter accepted the checks in controversy with knowledge that the funds upon which they were drawn belonged to appellee, and that Dill, with whom he dealt, was misappropriating the money. By the means of these checks, which, in his hands at least, were tainted with the illegality of the transactions in the settlement of which they were drawn, appellant procured the bank to swell his account with the money belonging to appellee. Under the facts certainly it must be said that the equities are all with the appellee, and neither of the appellants are in a position to successfully assail her right to recover.

Some other alleged errors are discussed by appellants' counsel, but the judgment is so manifestly right upon the evidence, that even if we should concede that the intervening rulings of which they complain were erroneous, they would not result in a reversal. See section 670, Burns' R. S. 1894 (658, R. S. 1881).

The judgment is affirmed at the cost of the appellants.

Leach et al. v. Mattix, Administratrix.

LEACH ET AL. v. MATTIX, ADMINISTRATRIX.

[No. 18,267. Filed December 14, 1897.]

APPEAL.—Record.—Certification of Original Document.—In the absence of statutory authority an original paper or document cannot be certified to the Supreme Court, so as to become a part of the record. *p. 148.*

SAME.—Incorporation of Evidence in Record.—Instructions.—Statute Construed.—Under the act of March 8, 1897, providing that the original bill of exceptions embracing the evidence may, on appeal, be certified as a part of the record, it is improper to incorporate the instructions, as the statute applies only to the evidence and its incidents. *pp. 147, 148.*

From the Tipton Circuit Court. *Affirmed.*

D. Waugh, J. P. Kemp, J. N. Waugh, J. C. Blackledge and C. C. Shirley, for appellants.

B. C. Moon and C. Wolf, for appellee.

MCCABE, J.—The appellee, as administratrix of James Mattix, sued the appellants, John M. Leach, William H. Sumption and Charles H. Leach, on a promissory note dated April 2, 1877. On the issues as they stood in the first trial judgment was rendered for the defendants, the present appellants. On appeal to the Appellate Court that judgment was reversed and the cause remanded to the trial court. *Mattix, Admx., v. Leach*, 16 Ind. App. 112.

New issues were made in the case when it went back to the trial court. John M. Leach was the principal in the note, and the other defendants were his sureties. He had been discharged in bankruptcy. And after his discharge he had entered into a contract with the payee of the note to purchase it for \$350.00 to be paid in property. A part of the property was delivered to the payee, consisting of a house and some ice. Before he had completed the delivery of quite all the ice, the payee claimed that he had lost the note, but promised

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he would find it, and deliver it upon the completion of the delivery of the ice. No more ice was delivered for many years, when the payee found the note. Thereupon, the principal in the note tendered in money \$50.00, which was more than the value of the undelivered ice, and demanded the completion of the contract of sale of the note; but the payee repudiated the contract of sale and demanded payment of the amount due on the note after deducting the amount he had received. At the time the contract for the sale of the note was made, the sureties were insolvent, but when the refusal to carry out the terms of the contract took place they were probably solvent. So, also, was the principal, John M. Leach. These facts and others had been pleaded before only by way of answer. Among the facts involved in the issues at the last trial was the allegation that the bankrupt had revived his obligation by a new promise to pay the debt. The last trial resulted in a verdict and judgment against the defendants over their motion for a new trial. The ruling denying such motion is called in question by the assignment of errors. The only error complained of under that motion is the giving of three instructions.

We are met at this point by an objection from the appellee's counsel to the consideration of those instructions because, as is claimed, they have not been made a part of the record. The longhand manuscript of the evidence and all the instructions given, as well as those refused, are incorporated in one and the same bill of exceptions, and that original bill of exceptions is certified in the transcript, and no part of it has been transcribed by the clerk. Appellee's contention is that there is no legal authority to certify up to this court an original bill of exceptions so as to make it a part of the record where such bill incorporates other matters than the evidence and its incidents. The

Leach et al. v. Mattix, Administratrix.

above stated condition of the bill of exceptions is not denied by the learned counsel for the appellants. We think the contention of the appellees must prevail.

It has been held by this court that in the absence of statutory authority an original paper or document cannot be certified to this court so as to become a part of the record. *Goodwine v. Crane*, 41 Ind. 335; *Reid v. Houston*, 49 Ind. 181-183. But our statute on long-hand manuscripts has been construed to authorize an original bill of exceptions to be incorporated in the transcript on appeal to this court, so as to make it a part of the record, only when the bill of exceptions incorporates nothing else than the longhand manuscript of the evidence. *McCoy v. Able*, 131 Ind. 417. This court in that case, on pages 422-3, said: "But the rule we declare does not have, and cannot be made to have, any application to any other bills of exceptions except such as are prepared for the purpose of bringing into the record the longhand manuscript of the official reporter and its necessary incidents. All other bills of exceptions must be copied by the clerk. Nor can the rule apply to a bill of exceptions wherein other matters than the longhand report and matters legitimately connected therewith are sought to be brought into the record. In order to come within the rule stated, the bill of exceptions must be confined to the single office of exhibiting the report of the evidence and the matters directly and properly pertaining thereto."

The legislature did not make the act, approved March 8, 1897, to cover bills of exceptions containing other matters than those embracing the evidence and its incidents. That was an attempt to simplify the method of getting the evidence and its incidents incorporated in a bill of exceptions into the record. Acts 1897, p. 244. *Weakley v. Wolf*, 148 Ind. 208.

McFarlan v. The State.

The instructions not having been made a part of the record, the questions sought to be raised on them are not before us.

The judgment is affirmed.

McFARLAN v. THE STATE.

[No. 18,452. Filed December 14, 1897.]

OFFICERS.—*Sheriff Has no Right to Demand Fees in Advance.*—A sheriff, in the absence of statutory authority, cannot demand payment of his fees before serving a summons issued to him from another county.

From the Delaware Circuit Court. *Affirmed.*

B. L. Smith, Claude Cambern and D. L. Smith, for appellant.

F. L. Gass, H. L. Hopping, Frank Ellis and John T. Walterhouse, for State.

MONKS, J.—On June 15, 1897, Nettie L. Kenner began an action against Ralph H. Kenner in the Delaware Circuit Court. A summons was duly issued by the clerk of said court to appellant, as sheriff of Rush county, Indiana, in which county the said Ralph H. Kenner resided, commanding said sheriff to serve the same upon said Kenner, and make due return thereof. Upon receipt of said summons, appellant notified the clerk of the Delaware Circuit Court and the attorney of Nettie L. Kenner, that he would not serve said summons until his fees for the service thereof, amounting to \$2.05, were first paid. Upon a proper showing of said facts, the Delaware Circuit Court entered an order directing the appellant to appear on the 28th of June, 1897, and show cause why he should not be adjudged in contempt of said court for refusing to serve said summons and make return thereof as commanded. On the day named appellant appeared in

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McFarlan v. The State.

said court and filed his answer, stating his reasons for not serving said summons, which the court held was insufficient, and adjudged the appellant to be in contempt of said court for refusing to serve said summons, and assessed a fine against appellant, from which judgment appellant appeals.

The only question presented by the record is whether or not a sheriff has the right to demand payment of his fees before serving a summons issued to him from another county.

At common law the sheriff cannot refuse to execute a writ before his fees are paid. *Hescott's Case*, 1 Salk. 330; *Hopman v. Barber*, 2 Strange *814; *White v. Haugh*, 2 Strange *1262; *Bridge v. Cage*, Cro. Jac. 103; *Adams v. Hopkins*, 5 Johns. 252, 255; *Crofut v. Brandt*, 58 N. Y. 106, 17 Am. Rep. 213; *Jones v. Gup-ton*, 65 N. C. 48; 1 Tidd's Prac., pp. *233, *404, *405; Allen on Sheriffs, 362; Murfree on Sheriffs, sections 891, 1072.

In *White v. Haugh*, *supra*, "the court said they could not be making bargains with people to obey their process, which they would enforce an obedience to, and leave the sheriff to his action of debt for the fees, which was his legal remedy." In *Adams v. Hopkins*, *supra*, the court said that "the sheriff has no discretionary power whether to perform the service or not. He is bound to execute every legal process delivered to him before he can demand his fees." It is said in Allen on Sheriffs, at p. 362, that "the sheriff must execute the process though his fees are not paid to him before the service; he cannot require a payment of the fees as a condition precedent to executing the writ. *

* * He is bound to execute every legal process delivered to him before he can demand his fees." It was held in *Williams v. State*, 2 Sneed. (Tenn.) 162, that no fees are due an officer until the services are rendered.

McFarlan v. The State.

It is clear that unless there is a statute authorizing a sheriff to collect his fees in advance, he is bound to execute every legal process delivered to him before he is entitled to demand and receive the fees therefor. It is well settled in this State that an officer is only entitled to such fees as the statute provides, and that he has no right to tax and collect any fee for services unless he can produce a statute which authorizes him to do so. *Eley v. Miller*, 7 Ind. App. 529, 534, and cases cited; *Wood v. Board, etc.*, 125 Ind. 270; *Noble v. Board, etc.*, 101 Ind. 127; *Legler v. Paine*, 147 Ind. 181, 182; *Stiffler v. Board, etc.*, 1 Ind. App. 368.

Section 7945, Burns' R. S. 1894 (5868, R. S. 1881), makes it the duty of the sheriff to execute all process directed to him by legal authority. That the process in this case was directed to appellant by legal authority is not questioned. The act of 1895 fixing the compensation of State and county officers (Acts 1895, p. 319), fixes the compensation of sheriffs, and there is nothing in said act, or any other statute, authorizing a sheriff to exact the payment of fees allowed by law for the performance of any duty, before such duty has been performed; but, on the contrary, by section 128, of the act of 1895 (Acts 1895, p. 356), it is made unlawful for any sheriff to tax any fees or make any charges for services not actually performed. See, also, section 6545, Burns' R. S. 1894 (E. S. 1972).

The fact that section 122 of the fee and salary law of 1895 provides "that in the execution of all processes issued from any other county than that of his residence, the sheriff shall be entitled to charge and collect the same fees for like services in similar cases, and which shall be his own" adds nothing to the force of appellant's claim. Neither the letter nor the spirit of the statute sustains appellant's contention, and the courts are not required to delay proceedings and wait

Leach v. Rains et al.

for the execution of their mandates while the officers charged with the execution thereof collect or arrange for the payment of their fees. It is true that the fees for the service of the process issued to the appellant from the Delaware Circuit Court would be, when earned, the property of appellant, because the statute so expressly provides. *Legler v. Paine, supra*, on p. 185. But the statute did not authorize him to name the conditions upon which he would discharge his official duty by executing the mandates of said court in serving said summons. It was the duty of the appellant, as sheriff, to serve said summons promptly, and make return thereof as commanded in the writ; and then, if his fees were not paid, he was entitled to collect the same in the manner provided by the statute.

As the fees of sheriffs and all other officers are regulated by statute, and in many of the states officers are authorized by statute to demand and receive their fees for official services before such services are performed, the decisions in other jurisdictions are not entitled to consideration in this case, unless it is shown that they were made under statutes substantially the same as our own.

Finding no available error in the record, the judgment is affirmed.

LEACH v. RAINS ET AL.

[No. 18,255. Filed December 16, 1897.]

HUSBAND AND WIFE.—*Postnuptial Agreement as to Wife's Real Estate.—Simultaneous Deeds Construed Together When a Part of Same Transaction.*—A husband and wife, for the purpose of making a marriage settlement, joined in a deed of conveyance of the wife's real estate to a trustee. The deed contained the clause "each of the grantors does release any and all interest in the tract so conveyed to the other, which is now or might hereafter exist on account of the marital relations of the two." The trustee recon-

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Leach v. Rains et al.

veyed separate parts of the real estate to the husband and the wife. *Held*, upon the death of the wife prior to the death of the husband, that the husband's right of heirship thereto, under section 2651, Burns' R. S. 1894, was barred by the deed he and his wife had executed. *Held*, also, that the three deeds were a part of the same transaction, and must be construed together. pp. 154-156.

DEED.—*Acceptance Binds Grantee.*—Where a grantee accepts a deed and takes possession of the real estate thereby conveyed, he is bound by the conditions of the deed in like manner as if he had signed an agreement containing the same. p. 157.

HUSBAND AND WIFE.—*Antenuptial and Postnuptial Contracts as to Wife's Real Estate.*—The husband's interest in his wife's real estate during marriage and his right of inheritance under the statute may be waived by an agreement either antenuptial or postnuptial. pp. 158, 159.

SAME.—*Postnuptial Contract as to Wife's Real Estate.*—*Waiver of Husband and Wife of Right to Inherit from Each Other.*—Where a wife, through a trustee, conveyed one-half of her real estate to her husband, and by the terms of the deed released her right to inherit such real estate from her husband should she survive him, and the husband made to his wife a similar deed conveying to her his interest in the other half of her real estate, the husband and wife both joining in the deeds to the trustee, and the husband accepted the deed, and took and held possession of the real estate conveyed to him, receiving the rents and profits thereof for more than ten years, until the death of his wife, the covenant releasing his right of inheritance is binding on the husband whether the wife had the power to waive her right to inherit or not. pp. 158-161.

PLEADING.—*Cross-Complaint.*—A cross-complaint, like an original complaint, must state facts sufficient to entitle the pleader to some affirmative relief, and it cannot be aided by the allegations of other pleadings in the action. p. 163.

From the Howard Circuit Court. *Affirmed.*

C. N. Pollard, B. F. Harness and W. R. Voorhis,
for appellant.

J. C. Herron, F. N. Stratton, M. Bell and W. C. Purdum, for appellees.

MONKS, J.—Appellees brought this action against appellant to recover possession of and to quiet their title to the real estate described in the complaint. Appellant's demurrer to the amended complaint was overruled. Appellant filed a cross-complaint in two paragraphs, and appellees' demurrer to same was sus-

Leach v. Rains et al.

tained. Upon leave granted, appellant filed an amended second paragraph of cross-complaint, to which appellees' demurrer for want of facts was sustained. Appellant refusing to plead further, judgment was rendered in favor of appellees. The rulings of the court on the demurrers are assigned as errors.

It appears from the amended complaint, that in 1886, appellant and one Isabelle Lacy were husband and wife, it being the second marriage of each; that said Isabelle was the owner of eighty acres of land in Howard county, Indiana, and that, each being of an age when no children would likely be born to them, and said Isabelle having no children and no father or mother or brother or sister living, and having raised appellee, Della Rains, they were desirous of making a marriage settlement of the respective property rights of each in case of the death of either, and for the purpose of carrying into effect such settlement appellant and Isabelle Leach, his wife, on the 11th day of August, 1886, executed a deed conveying said eighty acres of real estate to a trustee. It was set forth in said deed that the same was made for the express purpose of having the grantee convey the east half of said real estate to appellant, and the west half to Isabelle Leach, his wife, "to the intent that, when said conveyances are made, each shall accept the same in full satisfaction and discharge of any interest either has in the tract conveyed to the other by virtue of the marital relations existing between them, and it is agreed and understood that in consideration of the making of said conveyances each of the grantors hereto does release any and all interest in the tract so conveyed to the other which now or might hereafter exist on account of the marital relations of the two." That, in accordance with said trust, the trustee, on the 11th day of August, 1886, executed a warranty deed conveying the

Leach v. Rains et al.

east half of said eighty acres to appellant. It was recited in said deed that appellant, the grantee, should receive and accept said real estate "in lieu of any interest he has or may have in the real estate this day conveyed to Isabelle Leach, his wife, either as her heir, or by virtue of the marital relations existing between them, under the statutes of Indiana, and the said Lewis Leach does hereby receive and accept this conveyance in lieu of and in full satisfaction of any and all claims on or interest in the real estate this day so conveyed to Isabelle Leach, his wife, that he has or may have as her heir, or by virtue of their being husband and wife: provided that she accept the tract so conveyed to her in lieu of her interest as his wife in the tract herein conveyed to him;" that appellant accepted said deed on said terms, and took and held possession of said real estate from the date of said deed, and has received the rents and profits thereof continuously until the commencement of this action. On the same day, August 11, 1886, said trustee, in accordance with said trust executed a warranty deed, conveying the west half of said eighty acres to Isabelle Leach. It was recited in said deed that "said Isabelle Leach shall receive and accept said conveyance in lieu of any interest she has or may have by virtue of her being the wife of Lewis Leach [appellant] in the real estate this day conveyed to him, and she does receive and accept the same in lieu of her interest in the same by virtue of her being the wife of said Lewis Leach [appellant]." Said Isabelle Leach accepted said conveyance and took and held possession of said real estate conveyed to her until when she died, intestate, the owner of said forty acres, leaving surviving her, appellant, her husband, and nephews and nieces, but no children or their descendants. It is clear, under the facts stated in the amended complaint, that appel-

Leach v. Rains et al.

lant would, unless prevented by the deeds set forth, take the forty acres in controversy, under section 2651, Burns' R. S. 1894 (2490, R. S. 1881), which provides that "if a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor."

Appellant insists that "his right of heirship to the land in controversy is not barred by the deed he and his wife executed, conveying the eighty acres to the trustee." It would seem clear, however, that the language that "each of the grantors does release any and all interest in the tract so conveyed to the other, which is now or might hereafter exist on account of the marital relations of the two," was comprehensive enough to include the right to inherit as heir under the provisions of section 2651, Burns' R. S. 1894 (2490, R. S. 1881). Heirship, under said section, depends upon the marital relations, and if that relation did not exist at the time of the death, the survivor could not inherit as heir or otherwise. Heirship of the survivor exists, therefore, on account of the marital relation of the two at the time of the death of the other. The language of the deed made by appellant and wife to their trustee therefore was comprehensive enough to, and did, authorize the trustee to insert the release contained in the deed to appellant of any interest he might have in the forty acres in controversy as heir of his wife or by virtue of the marital relation existing between them. But we are not required to depend alone on the language of the deed to the trustee, for as the three deeds were executed at the same time and relate to the same subject-matter and were part of the same transaction, they must, therefore, be construed together. *Burns v. Singer Mfg. Co.*, 87 Ind. 541, 547, and cases cited; *Ireland v. Montgomery*, 34 Ind. 174; *Schmueckle v. Waters*, 125 Ind. 265, 267; *Durland v. Pitcairn*, 51

Leach v. Rains et al.

Ind. 426, 444; *Cunningham v. Gwinn*, 4 Blackf. 341; *Sutton v. Bickwith*, 68 Mich. 303, 36 N. W. 79, 13 Am. St. 344, and note p. 351.

It is expressly stated in the deed to appellant, that he accepts the same in lieu of, and in full satisfaction of, any claims or interest in the real estate conveyed to his wife, that he has or may have as her heir, or by virtue of the marital relation existing between them; and by his acceptance of said deed and taking possession of said real estate he became and is bound by these conditions in like manner as if he had signed an agreement containing the same. *Street v. Chapman*, 29 Ind. 142; *Smith v. Hollett*, 34 Ind. 519; *Fairbanks v. Meyers*, 98 Ind. 92, 97, 98; *Chicago, etc., R. W. Co. v. Derkes*, 103 Ind. 520, 523, 524, and cases cited; *Thiebaud, Tr., v. Union Furniture Co.*, 143 Ind. 340, 344.

Construing said deeds together, it is evident that appellant not only released his rights in said forty acres, under section 2642, Burns' R. S. 1894 (2485, R. S. 1881), but also his rights under section 2651, Burns' R. S. 1894 (2490, R. S. 1881).

In *Glass v. Davis*, 118 Ind. 593, cited by appellant, the real estate was conveyed to the wife during coverture as her jointure in the lands of her husband. The court held that the one-third in fee, which the wife takes in the lands of her deceased husband under sections 2640, 2652, Burns' R. S. 1894 (2483, 2491, R. S. 1881,) was intended to take the place of the dower to which she was entitled before the passage of the statute, and that the jointure had the same effect on the interest the wife takes under our statute that it had on her dower interest; and that, as jointure merely barred a wife's right to dower, it only barred her right under the section of the statute giving her said one-third, and not her right as heir under section 2651 (2490), *supra*. In this case the conveyance was in lieu

Leach v. Rains et al.

of appellant's interest in said forty acres as heir of his wife or by virtue of the marital relation between them, and not in lieu of the one-third, as in *Glass v. Davis, supra*. That case is, therefore, not in point here.

It is next contended by appellant that no title passed by the deed of appellant and wife to the trustee, and that his wife died the owner of the eighty acres of land, for the reason that he could not legally consent to his wife's conveyance of her real estate to a trustee upon the express condition that one-half thereof should be reconveyed to him, and that she should be barred of all interest therein as wife and heir; that the wife would be the loser in such a transaction. A married woman may, through the intervention of a trustee, convey her separate real estate to her husband as a gift, or for a valuable consideration, subject to be avoided for fraud or undue influence on his part. *Johnson v. Rockwell*, 12 Ind. 76, 79, 80; *Hetrick v. Hetrick*, 13 Ind. 44, 45; Note to *Turner v. Shaw*, 9 Am. St. 323, 326; *Boyd v. De La Montagnie*, 73 N. Y. 498, 502, 29 Am. Rep. 197; *Darlington's Appeal*, 86 Pa. St. 512, 519, 520, 27 Am. Rep. 726; *Scarborough v. Watkins*, 9 Mon. (Ky.) 540, 547, 548, 50 Am. Dec. 528; *Jenne v. Marble*, 37 Mich. 319, 322; 14 Am. & Eng. Ency. of Law, 559; Reeve's Dom. Rel., p. 98; Schouler's Dom. Rel., section 190.

The deed of appellant and wife was executed in all respects as required by the laws of this State, and was sufficient to convey the eighty acres to said trustee. A married woman is authorized to convey her separate real estate by deed in which her husband shall join. Sections 3340, 6961, 6962, Burns' R. S. 1894 (2921, 5116, 5117, R. S. 1881).

It is settled law that parties in contemplation of marriage can, by contract, settle the rights that each shall have in their own and each other's property dur-

Leach v. Rains et al.

ing their married life, and that the survivor shall not inherit or take any of the property of the other or any interest therein. *McNutt v. McNutt*, 116 Ind. 545, and cases cited; *Bowen v. Swander*, 121 Ind. 164, 168; *Wiseman v. Wiseman*, 73 Ind. 112; *Shaffer v. Matthews*, 77 Ind. 83; *Richards v. Richards*, 17 Ind. 636; *Houghton v. Houghton*, 14 Ind. 505; *Garver v. Miller*, 16 Ohio St. 527; 14 Am. and Eng. Ency. of Law, 539; 5 Am. and Eng. Ency of Law, 909.

It follows that, if the deeds in this case had been executed before the marriage of appellant and his wife, that the same would have been binding on both parties. Appellant's capacity to contract was not impaired by the marriage. He possessed the same power to contract after his marriage as before. He could release his right in the property of his wife during the marriage and his right to inherit from her afterwards, the same after his marriage as before. *Wright v. Jones*, 105 Ind. 17; *Huffman v. Copeland*, 139 Ind. 221.

In *Wright v. Jones*, *supra*, it was held that when a husband, to secure a life estate in the homestead owned by his wife, verbally promises to relinquish his claim to all other interest in her property, and she, in consideration of that promise, undertakes to vest such life estate in him, the agreement is valid. The court said: "If the husband prefers a life estate in a particular piece of property, and to secure the desired estate promises to accept such a life estate and to relinquish his claim as to all other interest in his wife's property, and she, in consideration of that promise, undertakes to vest that life estate in him, the agreement is valid, because it possesses all the essential features of a contract. If the contract were carried into effect by the execution of a deed, it would, as it seems to us, be impossible to impeach it. No ground upon which it could be impeached occurs to us, and none has been

Leach v. Rains et al.

suggested. The difference between the case we have put by way of illustration and the real case consists simply in the method of vesting the life estate in the husband. In the supposed case the method is assumed to be by deed, while in the real case it is by will. * *

* Once it is granted that such a contract is valid, then it must follow that the method of vesting the estate is not of controlling importance." The right of inheritance under the statute may be waived by the husband by an agreement either antenuptial or post-nuptial, or may be restrained by some estoppel which he has imposed upon himself. *Roach v. White*, 94 Ind. 510; *Huffman v. Copeland*, *supra*, pp. 225, 226, 231.

Counsel for appellant, however, insist that a married woman has no power to release her right to inherit the land of her husband, and that, as "appellant's wife was not barred of heirship in the land conveyed to her husband if she outlived him, he is not barred from inheriting her lands, the agreements being mutual. If such agreement fail as to one of the parties it must fail as to both." Citing *Daubenspeck, Admr., v. Biggs, Admr.*, 71 Ind. 255, and 1 Wharton on Contracts, section 523. The case cited only holds that the evidence did not establish the antenuptial contract alleged, while the doctrine stated in Wharton only applies to executory contracts, when a promise is the consideration for a promise. In this case the contract is not executory, but was executed, and each party has accepted the deeds. After the deeds were accepted nothing remained to be done by either party. Each party had done all that he agreed to do and all that was intended to be done. Appellant did not make a mere promise to execute in the future a contract releasing his right to inherit said real estate from his wife, but by the execution and acceptance of the deeds he released his right to inherit. When the

deeds were delivered, this was accomplished, so far as he was concerned. His wife then held the real estate conveyed to her free from his right to inherit the same, or any part thereof. The release by appellant's wife of her interest, by virtue of the marital relation between them, in the real estate conveyed to him, was not the sole consideration for his release of the real estate conveyed to her. The forty acres conveyed to him formed a greater part, if not all, the consideration for his release. Even if, as contended by appellant, his wife did not have the power to bar her right to inherit the real estate conveyed to him, and she could have inherited the same if she had survived him, his relinquishment of his right as heir to the real estate conveyed to her is not ineffective for that reason, but the same is valid and binding upon him until vacated or set aside. Appellant, having taken possession of the real estate at the time of the conveyance to him, and held possession and received the income and profits thereof for more than ten years, until the death of his wife, is not now in a position to claim that his release, in consideration of which he acquired from his wife title in fee simple to said real estate, is ineffective for any purpose.

In this State, however, there are many contracts between husband and wife which are valid and may be enforced in equity if not at law. *Rinn v. Rhodes*, 93 Ind. 389; *Wilson v. Wilson*, 113 Ind. 415; *Brown v. Rawlings*, 72 Ind. 505; *Hollowell v. Simonson*, 21 Ind. 398; *Goff v. Rogers*, 71 Ind. 459; *Procter v. Cole*, 104 Ind. 373; *Rose v. Rose*, 93 Ind. 179; *Behreley v. Behreley*, 93 Ind. 255; *Reed v. Beazley*, 1 Blackf. 97; *Dutton v. Dutton*, 30 Ind. 452; *Harrell v. Harrell*, 117 Ind. 94; *Barnett v. Harshbarger*, 105 Ind. 410; *Wright*

VOL. 149—11

Leach v. Rains et al.

v. *Jones, supra*; *Huffman v. Copeland, supra*; *Worth v. Patton*, 5 Ind. App. 272.

It was a well settled rule before the enactment of statutes enlarging the rights of married women, that contracts between husband and wife concerning the separate estate of the wife were binding in equity. *More v. Freeman*, Bunb, 205; *Livingston v. Livingston*, 2 John. Ch. 537, 539. It is said in 2 Story's Eq. Jurisprudence, section 1372, "Thus, for example, if a wife having a separate estate should *bona fide* enter into a contract with her husband to make him a certain allowance out of the income of such separate estate for a reasonable consideration, the contract, although void at law, would be obligatory, and would be enforced in equity. * * * So if a husband and wife for a *bona fide* and reasonable consideration should agree that he should purchase land and build a house thereon for her, and that she should pay him therefor out of the proceeds of her own real estate, if he should perform the contract on his side she also would be compelled to perform it on her side."

It has been held that a contract between husband and wife, free from fraud or undue influence on his part, whereby she releases her right to inherit the property of the husband if she survives him, is valid. *Dakin v. Dakin*, 97 Mich. 284, 56 N. W. 562; *Chittock v. Chittock*, 101 Mich. 367, 59 N. W. 655; 1 Beach on Con., section 475; 2 Beach on Con., section 954. Such contracts on the part of the wife have been recognized as valid, and enforced in deeds and articles of separation. *Thomas v. Brown*, 10 Ohio St. 247; *Garver v. Miller, supra*; *Farwell v. Johnston*, 34 Mich. 342; *Randall v. Randall*, 37 Mich. 563; *Bissell v. Taylor*, 41 Mich. 702, 3 N. W. 194; *Rhoades v. Davis*, 51 Mich. 309, 16 N. W. 659; *Robertson v. Robertson*, 25 Ia. 350; *Owens v. Bank*, 31 Md. 325; *Glenn v. Clark*, 53 Md. 580; *Dillinger's Ap-*

peal, 35 Pa. St. 357, 361; *Reed v. Beazley*, 1 Blackf. 97; *Dutton v. Dutton*, *supra*; *Hilbish v. Hattle*, 145 Ind. 59; Stewart on Marriage and Divorce, section 182-190.

However, as the complaint is sufficient even if appellant's wife did not have capacity to release her right to inherit the real estate conveyed to him, we need not and do not determine whether or not she has such power in this State. The court did not err in overruling appellant's demurrer to the amended complaint. For the same reason the court did not err in sustaining the demurrer to the first paragraph of cross-complaint.

The amended second paragraph of cross-complaint alleges a series of transactions between appellant and his wife in her lifetime, upon which appellant claims there is due him a sum of money, and that the same is a lien on the real estate (describing the real estate in controversy) which she owned at the time of her death. It is also alleged that his wife died intestate, leaving no father or mother or child or children or their descendants surviving her, but left appellant as her only heir at law. It is not alleged that appellees have or claim any adverse interest in said real estate, or in the estate of said deceased. No reason is given for making appellees parties to said paragraph.

It is well settled that a cross-complaint, like an original complaint, must state facts sufficient to entitle the pleader to some affirmative relief, and that it cannot be aided by the allegations of other pleadings in the action. *Conger v. Miller*, 104 Ind. 592, and cases cited; *Masters v. Beckett*, 83 Ind. 595; 5 Ency. of Pl. and Prac., 680, 681.

It follows that the court did not err in sustaining appellees' demurrer to said amended second paragraph of cross-complaint.

There being no available error in the record, the judgment is affirmed.

In re Petition of Stroh, Sheriff of DeKalb County.

In re PETITION OF STROH, SHERIFF OF DEKALB COUNTY.

[No. 18,895. Filed December 16, 1897.]

APPEAL.—*Construction of Fee and Salary Law.*—*When Appeal Will Not Lie.*—No appeal will lie from an order of the trial court in a proceeding instituted by a county officer, under section 8105, Burns' R. S. 1894, for the construction of a fee and salary law.

From DeKalb Circuit Court. *Appeal dismissed.*

D. M. Link, for appellant.

MCCABE, J.—The appellant, as sheriff of DeKalb county, filed a petition in the circuit court that he is in doubt as to the proper charge to be made by him in his reports to the board of commissioners relating to the *per diem* allowed to him by the act approved March 11, 1895, for attending court; that said provision gives him the sum of \$2.00 *per diem*, to be paid by the county; that in his reports heretofore he has not charged himself with such *per diem*, believing that the provision aforesaid entitles him to such sum; that it is now claimed that he should make such charge to himself. And he respectfully asks the court to decide the question thus presented, and enter such decision upon the records of the court. The circuit court rendered a written opinion, holding that the \$2.00 *per diem* allowed by section 122, on page 354, of said act must be paid into the county treasury, or credited to the county by the sheriff as all other fees, with certain exceptions, not necessary to mention, as the property of the county, and cannot be paid back to the sheriff unless such payment is necessary to make the full amount of \$2,300.00, the amount of his annual salary allowed by section 38 of said act. The sheriff excepted to the opinion of the circuit court, and appeals therefrom to this court and assigns for error that said court erred

In re Petition of Stroh, Sheriff of DeKalb County.

in its conclusions of law, and in its construction of the statute covering fees and salaries of county officers.

This proceeding is probably founded on section 8105, Burns' R. S. 1894 (6029, R. S. 1881). That is section 36 of the fee and salary act, approved March 31, 1879. See Acts 1879, p. 130. Assuming without deciding that the section is still in force, we find no provision in said section or any other statute authorizing an appeal from such an order. The provision is that "said judge shall decide the same, which decision shall be entered of record as other orders of court are entered." The code only authorizes an appeal from a final judgment, or such interlocutory orders as are there specified. Sections 644, 658, Burns' R. S. 1894 (632, 646, R. S. 1881).

Our attention has been attracted to three decisions of this court touching the subject. *Ex parte Ford*, 74 Ind. 415; *State v. Barron*, 74 Ind. 374; *Board, etc., v. Pressly*, 81 Ind. 361. The first case seems to have been an application, under the section of the act referred to, for a construction of the fee and salary law, and the appeal in that case was entertained without the question of the right of appeal in such cases having been raised, considered, or thought of. The latter case was one which originated by the filing of a claim by the sheriff before the board of commissioners for an allowance for mileage. The board refused to allow a part of the claim, and he appealed to the circuit court, which gave judgment for the whole amount demanded, and the board of commissioners appealed to this court. That case neither directly or indirectly involved the question of the right of appeal from an order entered on such an application under the statute last referred to. It was there said by Woods, J., speaking for the court, that: "Whether such an order can be made without notice to the party concerned and what the effect of the order when made, either

In re Petition of Stroh, Sheriff of DeKalb County.

in respect to or beyond the particular service decided upon, we are not called upon to consider. No order of the circuit court or judge is shown to have been asked for or made under this section of the law in reference to the matter in issue. The appellee presented his claim to the board of commissioners, and appealed from the adverse decision to the circuit court. From the decision of that court the board had a clear right as in other cases to appeal to this court."

The second one of the cases was an appeal by the State, through the prosecuting attorney, from a judgment forfeiting money paid to the clerk instead of a recognizance bond, by the defendant. It did not involve the right of appeal from such an order.

Thus, it is made abundantly clear that neither of the last two decisions above referred to touches the right of appeal from an order made on such an application as is here involved.

The other case neither having considered or decided the question, we are left free to express our opinion that no appeal from such an order was ever contemplated or authorized by any statute or law. But in this case there was not even an order made or entered of record. There is nothing but a written opinion delivered, and it was not entered of record, but it is brought into the record in this court by a bill of exceptions. Therefore we are not at liberty to express any opinion as to the correctness of the construction of the statute given by the circuit court, because this appeal is not properly before us. But see *Legler v. Paine*, 147 Ind. 181.

The appeal is dismissed.

The Baltimore and Ohio Southwestern R.W. Co. v. Little, Admx.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. LITTLE, ADMINISTRATRIX.

[No. 18,124. Filed December 17, 1897.]

APPEAL AND ERROR.—*Complaint.*—*Review.*—Where a cause is submitted to the jury upon a single paragraph of a complaint, other paragraphs thereof will not be considered on appeal. pp. 167, 168.

PLEADING.—*Demurrer.*—A demurrer in the following language: "The defendant demurs to each, the first, second, third, and fourth paragraphs of the plaintiff's amended complaint, separately and severally, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action against it," challenges the paragraphs of complaint severally. p. 169.

NEGLIGENCE.—*Fellow Servant.*—*Employers' Liability Act.*—The exemption from the fellow servant rule, as provided by subdivision three of the employers' liability act, is intended to make corporations liable where the servant does an act or omits action in obedience to the command of the corporation, given by rule, regulation, or by-law, or through any person delegated with authority from the corporation to make the command, and not from the omission or neglect of the servant to comply with such command. pp. 169-171.

SAME.—*Fellow Servant.*—*Employers' Liability Act.*—The exemption from the fellow servant rule of servants in charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train upon a railway, as provided by the employers' liability act, section 7083, Burns' R. S. 1894 (Acts 1893, p. 294), does not include a brakeman charged with the duty of opening and closing a switch. pp. 171-174.

From the Pike Circuit Court. *Reversed.*

W. R. Gardiner, C. G. Gardiner and E. W. Strong,
for appellant.

Cullop & Kessinger and O'Neal & O'Neal, for ap-
pellee.

HACKNEY, J.—In the lower court the appellee recovered a judgment for damages alleged to have arisen from the appellant's negligent killing of John F. Little. The complaint was in four paragraphs, but the cause was submitted to a jury upon the second paragraph

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The Baltimore and Ohio Southwestern R.W. Co. v. Little, Admx.

only. It would, therefore, be improper to consider the sufficiency of other paragraphs. *Robinson v. Dickey*, 143 Ind. 205; *Marvin v. Sager*, 145 Ind. 261. The second paragraph of complaint alleged that Little was a locomotive engineer, in the employ of the appellant, in charge of a locomotive hauling a fast train eastward over the appellant's road; that a west bound extra freight train, in charge of a crew of appellant's employes, ran to the station of Cochran, where the appellant maintained switches, sidetracks, and a switch yard, and where said train was required to be sidetracked to permit said east bound passenger train to pass without stopping; "that one of the crew, the head brakeman, to whom the appellant had delegated its authority in that behalf (defendant, by its neglect and negligence, had no other employe at said switch and switch yard in charge thereof) to unlock and open the switch, so that said train could go upon said sidetrack, and whose duty it was, by the rules of the defendant, after said train got upon said sidetrack, to lock and close said switch, and the said brakeman did unlock and open said switch and did permit the said freight train to go in said switch and in and upon said sidetrack, and there said freight train was allowed to be and stand by the crew running and managing the same. But the said head brakeman, after said train got in upon said sidetrack, carelessly and negligently forgot and failed to close and lock said switch, and carelessly and negligently left the same open, unlocked and unfastened and in a dangerous condition." It is then alleged that Little's train, in passing said Cochran station, ran into the open switch and upon the sidetrack, colliding with said standing freight train and killing Little, all without the fault or negligence of said Little.

It will be observed that this paragraph is predicated

The Baltimore and Ohio Southwestern R.W. Co. v. Little, Admx.

upon the negligence of the head brakeman of the freight train, whose duty it was to open and close the switch, in forgetting to close it after the train had gone in upon the sidetrack.

The language of the appellant's demurrer was that "the defendant demurs to each, the first, second, third, and fourth paragraphs of the plaintiff's amended complaint separately and severally, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action against it." Appellee's learned counsel suggest that "Such a demurrer would have to be overruled if a single good paragraph appeared." We suppose it is intended to make the objection that the demurrer was joint and not several; but we think it manifest that the demurrer was to the paragraphs severally.

On behalf of the appellant the sufficiency of the second paragraph of the complaint is attacked by assignment of error and protracted discussion, and, while there is a mistaken contention for the appellee that the sufficiency of this paragraph is not attacked in discussion, her counsel discuss, as applicable to the evidence, the principles involved in the objections urged against the complaint. The limits of our inquiries have been narrowed somewhat by the following concessions of counsel for the appellee: "At the very threshold of our argument we feel called upon to concede, which we do frankly, that our cause would be untenable, under our Indiana decisions, but for the 'Employers' Liability Act' of March 4, 1893," * * * and "we concede again that we must ground our claim for an affirmation of the judgment on subdivisions numbered three and four of section one of that act."

This concession, which is undoubtedly correct, would, in the absence of the provisions of the act mentioned, defeat the appellee's recovery upon the rule

The Baltimore and Ohio Southwestern R.W. Co. v. Little, Admx.

that the head brakeman, whose negligence caused the collision and the death of Little, was a fellow servant of Little as to the act negligently omitted. It remains, therefore, to determine whether the paragraph of complaint in question stated a cause of action, freed, by the act mentioned, from the fellow servant rule.

The third and fourth subdivisions of section one of the act of March 4, 1893 (Acts 1893, p. 294), section 7083, Burns' R. S. 1894, are as follows, our figures separating them into specifications of exemption from the fellow servant rule: (1) "Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or" (2) "in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf." (3) "Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or" (4) "where such injury was caused by the negligence of any person, co-employee or fellow servant engaged in the same common service, in any of the several departments of the service of any such corporation, the said person, co-employee or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

The gist of the cause of action alleged, as we have seen, was in the omission of a duty, which duty was required by rule of the appellant corporation. The complaint did not allege that the omission by the

The Baltimore and Ohio Southwestern R.W. Co. v. Little, Admx,

brakeman was in obedience to a rule. It is plain, therefore, that the case does not fall within the first of the above specifications of the act.

The appellee's construction of this specification is that if any duty is enjoined, by rule, etc., upon a servant, and the duty is omitted or neglected, the corporation is liable for resulting injury. If this was the proper construction of the specification, there would be little requirement for other provisions of the act than those of the third subdivision, since it would strike down the fellow servant rule in its entirety wherever the act or omission is in the line of duty. It would make the corporation liable for the act or omission of a servant, whether negligent or not, and whether the duty negligently performed or negligently omitted may have been enjoined by the general rules, etc., of the corporation, or is in obedience to particular instructions from one "delegated with authority in that behalf." Such was not the intention of the legislature. On the contrary, we think there can be no doubt that it was intended by the third subdivision to make corporations liable, where the servant does an act or omits action in obedience to the command of the corporation given by rule, regulation or by-law, or through any person delegated with authority from the corporation to make the command and such act or omission results in injury to another. This construction not only arises from the unambiguous language of the subdivision, but is supported by the general character of the act and the provisions of subdivision four. Before leaving the third subdivision, it may be well to recall that the complaint does not allege the omission to have been pursuant to particular instructions from anyone, and in any view of the case, the second specification would give no aid to the pleading.

The fourth subdivision relates to the negligence of

The Baltimore and Ohio Southwestern R. W. Co. v. Little, Admx.

servants, and not, as with the third subdivision, to acts or omissions done or made by order of the company or some one in command. The specification which we have numbered three describes a class of servants for whose negligence corporations are made liable, and they are servants most of whom, if not all, have heretofore been held not to perform a duty which the master owed to other servants in the same general line of the common service, and therefore fellow servants. In other words, this specification but enlarged the class of vice principals as it had before existed. Does the negligent omission at the foundation of the cause of action here pleaded appear from the pleading to have been by any of the vice principals so described? The only allegation of the complaint is that the omitted duty was by a brakeman, and we find that brakemen are not named in the law among the vice principals therein so described.

But, in order to support the complaint, counsel for the appellee insist that the legislature did not intend to use the phrase "switch yard," but intended to separate the two words with a comma. With this change of punctuation, they would add to the number of vice principals one in "charge of any * * * switch," and then, from the duty to open and close the switch when he admitted his train to the sidetrack, argue that the brakeman was in "charge" of the switch at the time he neglected to close it. This position is supported by the insistence that there is not, in railroading parlance, any such term as "switch yard," and that the lexicographers recognize no such term.

In the statute the word "yard" is employed in connection with and as descriptive of railway service, and, as said in *Harley v. Louisville, etc., R. W. Co.*, 57 Fed. 144, "the court may know from its general knowledge of the methods and appliances of railroad com-

panies * * * [the yard] consists of sidetracks upon either side of the main tracks, and adjacent to some principal station or depot grounds, where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars either for deposit or for departure."

In *St. Louis, etc., R. W. Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886, the supreme court of Arkansas recognized the propriety of the term, and frequently employed it with reference to an action for personal injuries sustained in the yard of the railroad company where the switching and making up of trains was conducted. In *Rapalje & Mack's Digest of Railway Law*, Vol. 5, p. 60, a division of subjects entitled "Switch Yards" is employed. "Railroad yard" and "switch yard," we have no doubt are synonymous, and the latter term was used in the act under consideration as descriptive of the former. The term found its place in the allegations of the second paragraph of complaint, and was doubtless understood by the draughtsman of the pleading to describe a yard where switching is done by a railroad company.

Accepting our construction of the third specification there is no place for the contention of appellee's learned counsel that the temporary use of the switch by the brakeman placed him in "charge" of it, within the meaning of the act.

Other arguments are made as to the duties of yard master and conductor, as disclosed by rules of the company, some of which rules, it is admitted, were not in evidence. These arguments were addressed to the evidence and are not pertinent to the ruling upon demurrer to the complaint. The complaint proceeds upon no theory involving a breach of duty as to yard

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

masters or conductors, and we need to decide nothing with reference to such theory.

Other questions are presented by the record and argument, but, since the complaint must be held bad, no occasion exists to pass upon them, and they may not again arise.

The judgment is reversed, with instructions to sustain appellant's demurrer to the second paragraph of the complaint.

CITY OF TERRE HAUTE ET AL. *v.* EVANSVILLE AND
TERRE HAUTE RAILROAD COMPANY.

[No. 17,915. Filed Feb. 16, 1897. Rehearing denied Dec. 17, 1897.]

INJUNCTION.—*Municipal Corporations.—Extension of Street Over Railroad Right of Way.—Jurisdiction.*—An injunction will lie to prevent a city from extending a street over and across the freight yard and tracks of a railroad company already devoted to public use, where the city has no authority to make such extension. *p.* 176.

MUNICIPAL CORPORATIONS.—*Condemnation of Lands.*—Land once appropriated to a public use by a railroad company cannot be condemned by a city to inconsistent public uses, unless the statute expressly or by necessary implication authorizes such second appropriation. *p.* 176.

SAME.—*Railroads.—Condemnation of Right of Way for Streets.*—By section 3623, Burns' R. S. 1894 (Acts 1891, p. 122), cities are expressly authorized to lay out, extend, and open streets and alleys across the right of way and other lands of any railroad company, without regard to the use to which they were already devoted, however inconsistent therewith the second use might be. *pp.* 176-178.

SAME.—*Condemnation of Railroad Lands for Streets.—Assessment of Damages.*—Section 3623, providing for the condemnation of railroad right of way and grounds for streets, when construed with sections 3631-3634, Burns' R. S. 1894, provides an adequate method of assessment of damages for property so appropriated. *p.* 179.

CORPORATIONS.—*Special Charter.—Condemnation of Property.*—While the legislature may not amend or otherwise materially modify the special charter of a corporation unless the power is expressly reserved, yet the property of the corporation devoted to public use is subject to condemnation for a second use at the will of the legislature. *p.* 180.

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City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

EMINENT DOMAIN.—Railroads.—Municipal Corporations.—Condemnation of Railroad Right of Way.—The exercise of the power of eminent domain by a municipal corporation in the condemnation of the right of way and grounds of a railroad company operating under a special charter, for streets, under the authority of the State, is not an interference with the inviolability of contracts, for the reason that all contracts are made subject to the right of eminent domain. *p. 180.*

STREETS.—Condemnation of Lands For.—City Commissioners.—Appointment.—The use of the words circuit court in section 3629, Burns' R. S. 1894 (3166, R. S. 1881), in designating who should make the appointment of city commissioners, was intended to confer said jurisdiction upon the person who held the office of circuit judge, and not upon the court as a court. *p. 181.*

MUNICIPAL CORPORATIONS.—Appointment of City Commissioners.—Constitutional Law.—Section 3629, Burns' R. S. 1894 (3166, R. S. 1881), conferring the power upon judges of the circuit courts to appoint city commissioners, is not within the inhibition of article 8, of the State constitution, that no person charged with official duties under one of the departments of State government shall exercise any of the functions of another, except as in the constitution expressly provided. *pp. 181-186.*

CONSTITUTIONAL LAW.—Practical Construction.—Where a construction placed upon the constitution by the legislature has been acquiesced in by all of the departments of the State for over forty years, and a disregard thereof would destroy titles and impair the obligations of contracts, under the doctrine of practical construction such question will be regarded as settled. *p. 186.*

From the Vigo Circuit Court. *Reversed.*

George E. Pugh, Piety & Piety, Stimson, Stimson & Condit, for appellants.

John E. Iglehart, Edwin Taylor and Davis, Reynold & Davis, for appellee.

MONKS, J.—This is an appeal from a temporary injunction granted March 1, 1896, by the court below on motion of appellee, restraining appellant from taking any steps to extend Ohio street in the city of Terre Haute, across appellee's freight yard and fourteen tracks used for switching and storing cars and loading and unloading the same.

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

The question presented is one of jurisdiction. If the city officers had jurisdiction, injunction will not lie. But if the city had no authority to extend Ohio street across said freight yard and tracks already devoted to a public use, there was no jurisdiction, and injunction was an appropriate remedy. Section 3644, Burns' R. S., 1894; *City of Seymour v. Jeffersonville, etc., R. R. Co.*, 126 Ind. 466; *Tucker v. Sellers*, 130 Ind. 514, 521; *Bass v. City of Fort Wayne*, 121 Ind. 389, 392; *Smith v. Goodknight*, 121 Ind. 312; *Adams v. Harrington*, 114 Ind. 66, 71; *Caskey v. City of Greensburgh*, 78 Ind. 233.

It is also well settled that land once appropriated to a public use by a railroad company cannot be condemned by a city to inconsistent public uses, unless the statute expressly or by necessary implication authorizes such second appropriation. *Steele v. Empsom*, 142 Ind. 397; *Cincinnati, etc., R. W. Co. v. City of Anderson*, 139 Ind. 490, and cases cited on p. 492; 3 Elliott on Railroads, sections 964, 966.

It is conceded by appellant that the proposed street, if located across appellee's freight yard and fourteen tracks used for switching and storing cars and loading and unloading the same, would be inconsistent with such uses and would materially injure and impair the same. Under the law as it existed in this State prior to March, 1891, it was held that there was no statute, expressly or by necessary implication, authorizing such second public use, if it destroyed or materially injured the first public use. *Cincinnati, etc., R. W. Co. v. City of Anderson, supra*; *Steele v. Empsom, supra*.

By an act of the General Assembly, approved March 6, 1891 (Acts 1891, p. 122), section 3623, Burns' R. S. 1894, it was provided that: "The common council shall have exclusive power over the streets,

City of Terre Haute *et al. v. Evansville and Terre Haute R. R. Co.*

highways, alleys and bridges within such city. *
* * * * to lay out, survey, extend and open
new streets and alleys; * * * * they may
cause buildings, structures or other things in the way
of any street or other public improvement to be taken
down, removed and appropriated, upon the payment
of damages as now provided by law; they may enter
upon, seize, appropriate, and condemn the right of
way, or other lands of any railroad company, person
or corporation passing through such city for street
or alley purposes, whether such lands be occu-
pied and used or not, upon payment of damages
as provided under and pursuant to the provisions
of an act entitled 'An act in relation to the lay-
ing out, opening, widening, altering and vaca-
tion of streets, alleys and highways, and for the
straightening or altering of water-courses by cities
of the state, and providing for the appointment of
commissioners to assess benefits and damages, pre-
scribing their duties and the method of procedure, and
providing for the collection of benefits and payment
of damages, and prescribing the duties of city officers
in relation thereto, and providing remedies in such
matters,' approved March 17, 1875, and the amend-
ments thereto."

By this act the power of cities was enlarged and
they were expressly authorized to lay out, extend, and
open streets and alleys across the right of way, and
other lands, of any railroad company without regard
to the use to which they were already devoted and
however inconsistent the second use might be there-
with. The only limitation upon the power of a city to
seize for public use property already devoted to a pub-
lic use by a railroad company is, that it shall be for
"street or alley purposes." If we should hold under

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

section 3623, Burns' R. S. 1894, that such property could not be devoted to a second public use if the same were inconsistent with the first public use, the amendment of 1891 would be ineffective for any purpose, because before the same was passed cities had the power to extend streets across railroad property when the second use would not be inconsistent with the first use. *City of Fort Wayne v. Lake Shore, etc., R. W. Co.*, 132 Ind. 558, 565, 566, 18 L. R. A. 367; *Cincinnati, etc., R. W. Co. v. City of Anderson, supra*.

It is clear, we think, that it was the intent of the General Assembly, by the act of 1891, to grant the power to cities, in regard to extending streets and alleys across the property devoted to public use by railroads, that they did not already possess, and authorize them to appropriate such property to a second public use, although the same would be inconsistent with the first. Statutes in substantially the same language as section 3623, *supra*, have been held in other states to grant such power. *Illinois, etc., R. R. Co. v. City of Chicago*, 138 Ill. 453, 28 N. E. 740; *Chicago, etc., R. W. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109; *Illinois, etc., R. R. Co. v. City of Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; *Illinois, etc., R. R. Co. v. City of Chicago*, 156 Ill. 98, 41 N. E. 45.

It is insisted by appellee that the act of 1891 provides no method for the assessment of adequate damages for the property sought to be appropriated. The statute authorizes the seizure of the right of way or other lands of a railroad company, whether the same are occupied or not, and such seizure is only authorized upon payment of damages assessed under the provisions of the act approved March 17, 1875, and the amendments thereto, being sections 3629-3657, Burns' R. S. 1894.

City of Terre Haute *et al.* v. Evansville and Terre Haute R. R. Co.

Sections 3631-3634, Burns' R. S. 1894, require the city commissioners to examine the property sought to be appropriated, and estimate its value, and in assessing and awarding damages and benefits, they shall estimate benefits and damages to all the real estate injuriously or beneficially affected. They shall assess upon each lot of land belonging to the same person the damages done thereto, and report the value of the property to be appropriated, and the damages to property, where no part thereof is taken.

Section 3623, Burns' R. S. 1894, is to be construed in connection with said sections, and when so considered "buildings, structures or other things" on the right of way or other lands of a railroad company, in the way of the opening or extension of any street, may be taken down, removed, and appropriated, upon payment of damages to be assessed under the provisions of the act of 1875 and the amendments thereof, section 3629-3657, *supra*. The provisions of these sections are as broad and more definite and certain than the statute concerning the seizure of property for railroad purposes, under which ample damages have been allowed. *Evansville, etc., R. R. Co. v. Swift*, 128 Ind. 34; *Chicago, etc., R. W. Co. v. Hunter*, 128 Ind. 213; *Indiana, etc., R. W. Co. v. Allen*, 100 Ind. 409; *White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids, etc., R. R. Co. v. Horn*, 41 Ind. 479; *Baltimore, etc., R. R. Co. v. Lansing*, 52 Ind. 229, and cases cited on page 233; Elliott on Roads and Streets, 191-207.

It is clear, we think, that the damages are not limited to the value of the real estate actually taken, but that by said sections ample provision is made for the assessment of all damages and their prompt payment in cases like the one at bar. Elliott on Roads and Streets, p. 191-207.

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

While the legislature may not amend or otherwise materially modify the special charter of a corporation unless the power is expressly reserved (*Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460), yet the property of the corporation devoted to public use is subject to condemnation for a second public use, at the will of the legislature. *Illinois, etc., Canal Co. v. Chicago, etc., R. R. Co.*, 14 Ill. 314; *Newcastle, etc., R. R. Co. v. Peru, etc., R. R. Co.*, 3 Ind. 464, 468; *Lafayette Plankroad Co. v. New Albany, etc., R. R. Co.*, 13 Ind. 90; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507; *Enfield, etc., Co. v. Hartford, etc., R. R. Co.*, 17 Conn. 454.

It is true as claimed by appellee that its special charter is a contract with the State, but it is subject to the right of eminent domain which remains in the State. The exercise of this power by a state or under the authority of the state is not an interference with the inviolability of contracts, for the reason that all contracts are made subject to the right of eminent domain. *West River Bridge Co. v. Dix, supra*; *Richmond, etc., R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71; *Greenwood v. Freight Co.*, 15 Otto 13, 22; *Milner v. New Jersey R. R. Co.*, 6 Am. Law Reg. 6; *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 330-331; *Ashuelot R. R. Co. v. Elliot*, 58 N. H. 451, 456; *Enfield, etc., Co. v. Hartford, etc., R. R. Co.*, *supra*; *Beekman v. Saratoga, etc., R. R. Co.*, 3 Paige, 45, 73; 22 Am. Dec. 679; 3 N. Y. Ch. (L. R. A. ed.) note p. 45; *Murphy v. Beurd*, 138 Ind. 560, 564.

The assessment of damages and benefits in the opening, laying out and extending of streets and alleys is committed by the act of 1875 to five persons called city commissioners, appointed by the judge of the circuit court of the county. Section 3629, Burns' R. S.

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

1894 (3166, R. S. 1881). The words circuit court used in the act of 1875 in designating who should make the appointment of city commissioners was intended by the legislature to confer said jurisdiction upon the person who held the office of circuit judge, and not upon the court as a court. *In re Johnson*, 12 Kansas 102. This body appellee insists is unconstitutional, for the reason that it is an attempt to confer executive power upon the judiciary, which is inhibited by article three of the constitution, which divides the power of the state government into three departments, and provides that no person charged with official duties under one department shall exercise any of the functions of another, and for the further reason that the appointment of city commissioners is an invasion of the right of local self government.

Article three of the constitution makes the power of each department exclusive and independent of the power of either of the others. The object is to secure absolute independence in each department from the encroachment of the other. The words "shall exercise any of the functions of another," mean that one shall not exercise any of the powers, jurisdiction, or authority of the others.

It is not a function of the executive or legislative department of the state government to appoint city commissioners, and when a circuit judge appoints city commissioners he is not exercising any function of either of said departments. Neither are the city commissioners when appointed a part of either the executive or legislative department of the state government, nor do they exercise any of the functions of either of said departments.

While the city commissioners do not constitute a court, yet their duties are quasi judicial and their powers have been likened to the powers and duties of

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

an *ad quod damnum* jury. *City of Elkhart v. Simonton*, 71 Ind. 7. Their powers and duties are more of a judicial than an executive or administrative character. The appointment of city commissioners is not a judicial act. A judicial officer may, by authority of law, perform other than judicial acts; but when performed they do not become judicial, because they were performed by a judicial officer. A circuit judge is authorized to take acknowledgment of deeds, solemnize marriages, certify as to qualifications of a notary public, appoint trustees of savings banks and appoint two members of the county board of review, and yet no one would claim that in performing these acts he exercises judicial functions.

The third article of the California constitutions of 1863 and 1879 is substantially the same as the third article of the constitution of this State.

In *Staude v. Election Commissioners*, 61 Cal. 313, it was held that a statute empowering and requiring the judges of three judicial districts to meet and choose three citizens of San Francisco, householders of good repute, who should constitute a board of police commissioners, was not open to the objection, that the judiciary of the state could not be charged with the duties or powers prescribed because of the third article of their constitution. The court held that said powers conferred on the district judges, did not come within the constitutional inhibition.

In *People v. Provines*, 34 Cal. 520, the legislature had provided that the police judge should be a member of the board of police commissioners, which board was authorized to appoint and remove police officers. It was insisted that the police judge had no authority to participate in the appointment of policemen, for the reason that such duties belonged to the executive department of the government, and that a judicial officer

City of Terre Haute *et al.* v. Evansville and Terre Haute R. R. Co.

could not, therefore, exercise the same under said third article of the constitution. The court held that the police judge had the right to act as a member of said board of police commissioners, for the reason that there was nothing in said article of the constitution which prohibited a judicial officer from exercising functions not in their nature judicial, if they did not belong to either the legislative or executive departments. See, also, *People v. Bush*, 40 Cal. 344.

This court held in *Waldo v. Wallace*, 12 Ind. 569, that the mayor of a city possessed executive, administrative, and judicial powers, but that his executive and administrative duties are not within the executive and administrative department of the state government, and that he might discharge such duties at the same time without violating article three of the constitution, and that a judge will be not less a judicial officer because some duties he may perform are administrative in their character. The following cases are to the same effect. *In re Guerrero*, 69 Cal. 88, 10 Pac. 261; *People v. Bush*, *supra*; *Uridias v. Morrill*, 22 Cal. 473; *Santo v. State*, 2 Iowa, 165, 220, 63 Am. Dec. 487, 516.

In giving to circuit judges, the power to appoint city commissioners, the legislature did not in any way infringe upon the right of local self government. Their appointment is not a matter of local concern, nor are they instrumentalities of local government. To that body is given the power of assessing the damages of one whose property is taken for public use under the power of eminent domain. The right of eminent domain belongs to the State, and is to be exercised in the manner and by means of the instrumentalities prescribed by the legislature, restrained only by the provisions of the constitution. When the legislature has the power over a subject, it is the sole judge

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

of the means that are necessary and proper to accomplish the object it seeks to attain. *State, ex rel., v. Kolsem*, 130 Ind. 434, 442. While the appointment of the city commissioners is not a legislative function, under our constitution, yet the power to name the persons or functionaries who shall make the appointment is a legislative function. *French v. State, ex rel.*, 141 Ind. 618, 29 L. R. A. 113; *State, ex rel., v. Hyde*, 129 Ind. 296.

The legislature has again and again, beginning with the time the present constitution took effect, conferred powers upon judges other than those of a strictly judicial character. At the first session of the legislature held under the present constitution, the following powers were given to judges. Acknowledgment of deeds, 1 R. S. 1852, p. 235, section 18, reenacted in 1859, section 3352, Burns' R. S. 1894 (2933, R. S. 1881); acknowledgment of deeds, to solemnize marriages, certify depositions and act as an accountant, 2 R. S. 1852, p. 22, section 35; assent to indentures of apprenticeship, 1 R. S. 1852, p. 363, section 4, section 7300, Burns' R. S. 1894; to solemnize marriages, 1 R. S. 1852, p. 361, section 3, reenacted in 1857, section 7291, Burns' R. S. 1894; certify to qualifications of notary public, 1 R. S. 1852, p. 377, section 1, reenacted in 1855, section 8035, Burns' R. S. 1894; take and certify depositions, 2 R. S. 1852, p. 84, section 245, reenacted in 1881, section 422, Burns' R. S. 1894; organization of corporations, 1 R. S. 1852, p. 239, section 3429, Burns' R. S. 1894; to examine the clerk's office and report in writing the manner in which the books and papers are kept, 2 R. S. 1852, p. 8, section 7937, Burns' R. S. 1894; to appoint city commissioners, 1 R. S. 1852, p. 216, section 581, reenacted in 1857 (Acts 1857, p. 661), reenacted in 1875, section 3629, Burns' R. S. 1894.

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

Since the first session of the legislature, under the present constitution, powers of the same kind have been from time to time given to judges by the law making power: To enable persons whose wives are insane to convey real estate, Acts 1857, p. 82, sections 3386, 3387, Burns' R. S. 1894; to assent to conveyances by infant married women, Acts 1861, p. 154, sections 3360-3362, Burns' R. S. 1894; to certify to certain facts necessary to the organization of savings banks and appoint savings bank trustees, Acts 1869, p. 104, sections 2942, 2946, 2947, Burns' R. S. 1894; to appoint the members of the county board of equalization, Acts 1881, p. 611, section 129, section 6397, R. S. 1881; to appoint two members of the county board of review to assess, review, and equalize the taxes, Acts 1895, p. 75, section 114.

The act for the incorporation of cities passed by the first legislature under the existing constitution authorized the common council to lay out, survey, and open streets and alleys, and empowered the judge of the common pleas court to appoint the city commissioners to appraise the damages and benefits for the opening of streets. 1 R. S. 1852, pp. 215, 216, sections 57, 58. The same provisions were reenacted in 1857 (Acts 1857, p. 61, sections 59, 60). The act concerning the incorporation of cities passed in 1867 contained the same provisions, except the duty of appointing the city commissioners was imposed upon the common council of the city. Acts 1867, p. 63, sections 61, 62. In the act of 1875, which is now in force, the power of appointing city commissioners was given to the judge of the circuit court. Acts 1875, p. 17, section 3629, Burns' R. S. 1894.

While the powers conferred by the foregoing acts of the legislature upon the judges in this State are not strictly judicial, yet they are not such as belong to

City of Terre Haute et al. v. Evansville and Terre Haute R. R. Co.

either the executive or legislative departments of the state government, and are not therefore within the inhibition of article three of the constitution.

Moreover, said acts of the legislature certainly present a case of practical construction of the constitution upon the question raised. For over forty years this practice adopted by the legislature has been continued, and acquiesced in by all the departments of the State, and a disregard thereof by the court at this time might destroy titles, impair the obligations of contracts and do much mischief. Under the doctrine of practical construction, it would seem that the questions presented concerning the appointment of city commissioners by a judge should be regarded as settled. *Hovey, Gov., v. State, ex rel.*, 119 Ind. 386; *French v. State, ex rel.*, 141 Ind. 618, 628; *Fall v. Hazelrigg*, 45 Ind. 576, 585; *State v. McAlister*, 88 Tex. 284, 28 L. R. A. 523, 31 S. W. 187.

If any of the commissioners are interested, or have any property which is affected, provision is made for the appointment of commissioners *pro tempore*. Section 3630, Burns' R. S. 1894; *Bradley v. City of Frankfort*, 99 Ind. 417.

The constitutional right of a property owner to have his damages assessed by disinterested persons is satisfied if an appeal is given and an opportunity is thus provided for a trial by a judicial tribunal. *Bass v. City of Fort Wayne*, 121 Ind. 389, and cases cited.

The city council had jurisdiction of the proceedings to extend Ohio street across appellee's freight yard, and it follows therefore that injunction will not lie.

The order granting a temporary injunction is reversed.

Royse et al. v. Bourne et al.

ROYSE ET AL. v. BOURNE ET AL.

[No. 18,182. Filed Oct. 6, 1897. Rehearing denied Dec. 17, 1897.]

PRACTICE.—Special Finding.—Motion for Judgment.—A motion for judgment upon the special finding of facts and the conclusions of law taken together is properly overruled. p. 189.

SAME.—Special Finding.—How Conclusions of Law Are Tested.—The proper mode of testing the validity of conclusions of law based upon a special finding is by an exception, and not by motion for judgment. p. 189.

APPEAL.—Joint Assignment of Error.—An exception to two separate findings or conclusions of law is not available error if either conclusion is warranted by the facts. p. 190.

SAME.—Bill of Exceptions.—Evidence.—The Supreme Court cannot consider and decide any question which depends for its decision upon the entire evidence, when the bill of exceptions affirmatively shows on its face that all the evidence is not in the record, notwithstanding a statement in the bill that it contains all the evidence. p. 191.

SPECIAL FINDING.—Amendment of by Trial Court.—A special finding may, during the term and before the rendition of the final judgment, be amended or corrected to conform to the facts proved. p. 192

From the Washington Circuit Court. *Affirmed.*

J. A. Zaring, M. B. Hottel and F. M. Hostetler, for appellants.

D. W. Alsbaugh, J. C. Lawler and Harvey Morris, for appellees.

JORDAN, J.—The appellees, other than Durnil, as judgment creditors of Gabriel T. Royse, instituted this action to set aside certain alleged fraudulent mortgages executed by said Royse to his co-appellants, the latter being his wife, mother, sister, and brother. Appellee Durnil is a *bona fide* mortgage lien holder upon the lands of Gabriel T. Royse, and his said lien is senior to the mortgages which appellants claim to hold upon the real estate in question. Durnil was made a party defendant in this action, and at the same term of court he commenced proceedings against ap-

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Royse et al. v. Bourne et al.

pellants to foreclose his mortgage, and on motion his suit was consolidated with this action, and he became a cross-complainant therein. Upon the issues being joined between the parties on their respective pleadings, both actions were tried as one cause, and, upon request, the court made a special finding of the facts and stated its conclusions of law thereon. In paragraph three of the special finding, facts are found by the court which entitled appellee Durnil to a judgment upon his notes as against Gabriel T. Royse, and a foreclosure of his mortgage against all of the defendants to his action.

The court's several conclusions of law were numbered one, two and three. Number one, under the facts found, awarded a judgment in favor of appellee, Durnil, upon his notes and mortgage. Number two declared the mortgages executed by Gabriel T. Royse on February 23, 1895, to Nancy and William B. Royse to be fraudulent, and that the same should be set aside, and the mortgaged premises subjected to sale in payment of the claims due to the plaintiffs; that the mortgage held by the appellant, Mrs. Jackson, to the amount of \$312.00, was fraudulent, and to that amount the same should be set aside, but the remainder thereof, to wit, \$808.00, was declared to be valid and held to be a senior lien over the judgment of plaintiffs. The third conclusion stated the manner in which the proceeds arising from the sale of the mortgaged realty should be applied. At the close of these conclusions the appellants reserved their exceptions as follows: "To which special findings of the facts and the conclusions of law stated thereon the defendants, and each of them, at the time except." Judgment was rendered in favor of appellees in accordance with the facts and conclusions of law.

Appellants in their assignment of errors have spec-

ified twenty-two rulings of the trial court which they allege are errors, but a part only of these are in any way urged or considered by their counsel. Appellants filed written motions, and in each of these they demanded that the court "render judgment in their favor upon the special findings and conclusions of law herein." These motions were overruled, and appellants now insist that by these rulings the court erred, for the reason that the facts embraced in the special finding were not sufficient to entitle appellees to a judgment; hence, the judgment should have been in favor of appellants, or, at least, in favor of some of the latter, of which particular mention is made in their brief.

The decision of the court in denying the motion or motions in controversy was right, at least for two reasons: First. The motion was so framed as to couple the facts as found and the conclusions of law thereon as stated by the court together, and a demand was made therein for judgment upon both the facts and conclusions. Second. The motion did not proceed upon the theory that the moving party was entitled to a judgment upon the facts, but upon the conclusions of law and the facts taken together. The court's conclusions were, in the main, adverse to all of the appellants, and afforded no foundation for the judgment which they demanded. If appellants believed they were entitled to move for judgment upon the special findings, they ought to have proceeded upon that theory, and not have combined the facts and conclusions together in their motion, and then demand judgment upon both. The validity of conclusions of law based upon a special finding, cannot be reached by a motion for a judgment, but is tested by an exception. This is the recognized practice. See Elliott's App. Proc., sections 757, 793, and cases there cited. To say the least, it is a questionable procedure to move

Royse et al. v. Bourne et al.

for a judgment upon a special finding, which is confined to the facts within the issues, after the court has stated its conclusions thereon adversely to the moving party. See Elliott's App. Proced., section 767. Considering the manner in which the facts were stated in the finding upon the issues involved, the motion may also be said to have been too broad and general, as it demanded a judgment upon all the findings. The facts embraced in the third paragraph of the finding upon the notes and mortgage of appellee, Durnil, were clearly distinct, and there is no claim, nor can there reasonably be, that appellants, or any of them, were entitled to a judgment in their favor on these facts. However, without regard to this feature, the motion was addressed to the finding as an entirety, and specified no particular facts upon which a judgment was demanded. As the findings, taken as a whole, upon all the issues, did not warrant a judgment thereon in favor of appellants, or either of them, the motion, for this reason, was also properly denied. See *Johnson v. Culver*, 116 Ind. 278; *Louisville, etc., R. W. Co. v. Green*, 120 Ind. 367; Elliott's App. Proced., section 770.

It is contended that the conclusions of law, under the facts found, cannot be sustained. Appellees, however, urge that the exceptions of appellants to the conclusions were taken as to all, and to no one in particular, and, if any is correct, the exceptions are not available. There are three conclusions of law, numbered from one to three inclusive. No claim is made that all of the conclusions are erroneous, and it is evident that the first is correctly stated. Therefore, under a well settled rule, we are precluded from reviewing any of the questions which appellants' learned counsel seek to present upon the court's conclusions. *Saunders v. Montgomery*, 143 Ind. 185, and

authorities there cited; *Clause Printing Press Co. v. Chicago Trust and Savings Bank*, 145 Ind. 682.

It is next insisted that the evidence is not sufficient to support the finding. Appellees, however, confront us with their insistence that we are forbidden by a firmly settled rule, from considering any of the evidence, for the reason that it is affirmatively disclosed by the record that all of the evidence is not included in the bill of exceptions. It appears that a certain written schedule or statement relative to the amount of the indebtedness of appellant, Gabriel Royse, was upon the trial introduced in evidence, and the admission of this evidence is assigned in the motion below as one of the reasons for a new trial. This written document is not included in the bill of exceptions which exhibits the other evidence given in the case. It is true that the bill states that it contains all of the evidence, but it also shows that this statement is not correct, and under such circumstances we cannot consider or decide any question which depends upon the entire evidence. *Lyon v. Davis*, 111 Ind. 384; *Lawrenceburgh Furniture Mfg. Co. v. Hinke*, 119 Ind. 47; *Chicago, etc., R. W. Co. v. Eggers*, 147 Ind. 299.

In the case last cited we said: "When a part of the evidence, documentary or otherwise, given in the lower court, is omitted, it is manifest that this court, upon appeal, cannot intelligently or properly decide what bearing or effect, when considered in connection with the other evidence, ought to be given to the part omitted. Hence, in cases like the one at bar, where the finding of the court or verdict of the jury is assailed upon the ground that the same is contrary to the evidence, the rule asserted applies with full force, and all the evidence must be incorporated into the record, otherwise, we must presume in favor of the ruling of the lower court."

Royse et al. v. Bourne et al.

After the special finding was returned and filed by the court, and before the final judgment was rendered, it was discovered that the court had by mistake stated the amounts due to appellee Durnil on his notes, as principal, interest, and attorneys' fees, to be less than was actually due to him under the evidence. Upon the discovery of this mistake, the court, at the suggestion and request of counsel for Durnil, and over the objections of appellants, changed the finding in this respect so as to make it state the correct amount. This, appellants affirm, was error, for the reason insisted that the court having made and filed its finding, possessed no power to make any amendment or change thereto. Several decisions of this court, following *Wray v. Hill*, 85 Ind. 546, seem to deny that the trial court has the power to alter or change its special finding after it has been returned and entered of record. These cases, however, upon this point, have been overruled by more recent decisions, which assert a broader doctrine, and hold that the special finding, during the term, and before the rendition of the final judgment, may be properly amended or corrected to conform to the facts proved. *Thompson v. Connecticut, etc., Ins. Co.*, 139 Ind. 325; *Dowell v. Talbot Paving Co.*, 138 Ind. 675. See, also, *Gulick v. Connely*, 42 Ind. 134. It follows, therefore, that the court did not err in amending its special finding.

Complaint is made in regard to the admission of evidence to prove that appellant Margaret Jackson had taken the benefit of the exemption laws upon a certain judgment involved in this cause. We are not cited by counsel for appellant to any part of the voluminous record where this ruling of the court is exposed by a bill of exceptions. For their failure to comply with the rule and requirements of this court in this respect, we must decline to search the record unaided, in order

Indianapolis Brewing Company v. Claypool et al.

to discover this alleged erroneous ruling. *Harness v. State*, 143 Ind. 420.

There is no available error in this appeal, and the judgment is therefore affirmed.

INDIANAPOLIS BREWING COMPANY v. CLAYPOOL ET AL.

[No. 18,811. Filed Nov. 5, 1897. Rehearing denied Dec. 17, 1897.]

CONSTITUTIONAL LAW.—*Board of Park Commissioners.—Tenure of Office.*—The provision of the act approved March 1, 1895, sections 4246-4268, Thornton's R. S. 1897 (Acts 1895, p. 63), creating a department of public parks in cities having a population of more than 100,000, that the board of park commissioners shall hold office for the term of five years, is in violation of the inhibition of section 2, article 15, of the state constitution, that "the General Assembly shall not create any office the tenure of which shall be longer than four years," and the remainder of the act is inoperative for the reason that there are no instrumentalities left with which to carry the provisions thereof into operation and effect.

MONKS and JORDAN, JJ., dissenting.

From the Marion Circuit Court. *Reversed.*

Baker & Daniels, for appellant.

John W. Kern; James B. Curtis and Joseph E. Bell, for appellees.

MCCABE, C. J.—The legislature of 1895 passed an act approved March 1, 1895, entitled "An act to establish a department of public parks in cities having more than one hundred thousand population, according to the last preceding United States census, and a board of park commissioners, defining the powers and duties of such board and matters connected therewith, and declaring an emergency." Sections 7240-7261 Horner's R. S. 1897, (Acts 1895, p. 63). The appellant brought suit against the appellees, who are the acting members of said board, and certain other officers appointed by the circuit court at the instance

149	193
151	230
151	233

Indianapolis Brewing Company v. Claypool *et al.*

of said board, under the provisions of said act, to enjoin them from further acting by virtue of any authority conferred on them by said act. The circuit court sustained a demurrer to the complaint for want of sufficient facts; and, the plaintiff refusing to plead further or amend its complaint, the court rendered judgment that the plaintiff take nothing by its suit. That ruling is called in question by the assignment of errors as the only error complained of by the appellant. The ground on which the complaint seeks an injunction is that the act is unconstitutional. The first section thereof provides, *inter alia*, that in all cities of 100,000 inhabitants, as shown by the last preceding United States census, in addition to the executive departments now established by law in such cities, there is hereby established, as one of the executive departments of such city, a department of public parks, which shall be under the control of a board of five members, to be appointed by the mayor of such city, to be known as the "Board of Park Commissioners," and who are required to serve without compensation except their actual expenses. They are each required to take an ordinary official oath before entering upon the discharge of the duties of their offices respectively. The second section provides that the first members of said board shall hold office respectively, one, two, three, four, and five years from and after the first day of January, 1895, and annually thereafter the mayor shall appoint one such commissioner to hold office for the term of five years, beginning with the first day of January in the year of his appointment; and if any vacancy occurs in said board by resignation or otherwise, the mayor shall appoint one or more commissioners for the residue of the term, or terms. The complaint alleges *inter alia*: That plaintiff is the owner of ten and one-half acres of land within the corporate

Indianapolis Brewing Company v. Claypool *et al.*

limits of the city of Indianapolis, which land is particularly described; and that the then mayor, the Honorable C. S. Denny, appointed the defendants Claypool and Perry and three other persons, namely Frank A. Maus, William H. Leedy, and Henry Clay Allen, as a board of park commissioners of said city, who all qualified by taking the official oath; that thereafter said Maus resigned and said mayor appointed Sterling R. Holt in said Maus' place. That said Holt qualified in like manner, and he afterwards, upon the expiration of his term, was reappointed January 1, 1896, That said William H. Leedy resigned, and the then mayor, the Honorable Thomas Taggart, appointed in his place Albert Lieber, who qualified by taking the official oath, and upon the expiration of his term was reappointed January 1, 1897. That thereafter the said Henry Clay Allen resigned as one of said board, and said last mentioned mayor appointed in the place of said Allen, William E. English, who also qualified by taking the oath of office. That Claypool's appointment dates from his qualification, April 20, 1895; Oren Perry's from March 13, 1895; Sterling R. Holt's reappointment from January 1, 1896; Albert Lieber's reappointment from January 1, 1897; and William E. English's appointment from December 11, 1896. That the respective terms of said appointees would expire under the statute and said appointments as follows: Edward Claypool on January 1, 1898; Oren Perry on January 1, 1900; Sterling R. Holt on January 1, 1901; Albert Lieber on January 1, 1902; and William E. English on January 1, 1899.

That after said defendants had qualified as aforesaid, and assumed to discharge the duties and exercise the powers devolved on them by said act, they gave out that they will continue to exercise such powers as aforesaid, and they selected for the purpose of public

Indianapolis Brewing Company v. Claypool et al.

parks, along with real estate of other owners, the real estate hereinbefore described, and, pursuant to said act procured the Marion Circuit Court to appoint the defendants Joseph Flack, Charles E. Coffin, and Daniel Burton as assessors to assess damages and benefits to the owners of the property, aforesaid, proposed to be taken for public parks, and property beneficially affected by such public parks. That said assessors accepted said appointments, and, as provided in said act, they are now publishing in the Sun newspaper a notice to this plaintiff and the other owners of real estate to be affected, that they will on June 23, 1897, begin the assessment of said real estate for the aforesaid purposes. That the aforesaid park commissioners give out that, after said assessment shall have been made, they will proceed, in accordance with said act, to apply to the circuit court for the confirmation of such assessment, and thereupon to determine what, if any, part of the damages awarded shall be paid out of the funds set apart for the use of said board of park commissioners by the common council for such purpose, to the end that, in pursuance of section twenty-two of said act, the title of said real estate shall become fixed and vested in said city for the purposes of public parks. Similar allegations are made as to the assessment of benefits by said assessors. That said proceedings and acts of said board and said assessors are taken without warrant or authority of law, for the reason that said act of the legislature is unconstitutional and void.

The first reason urged for the unconstitutionality of the act is that it is an amendment of the act approved March 6, 1891, concerning the incorporation, etc., of cities of more than 100,000 population, and does not, as required by section twenty-one of article four, of the constitution, set forth and publish at full

Indianapolis Brewing Company v. Claypool et al.

length the act as revised or section as amended. But the recent case of *State v. Gerhardt*, 145 Ind. 439, and cases there cited, settled the law that the statute in question was not an amendment of the act referred to. But a much more serious question is presented by appellants' contention that the act violates the last clause of section two of article fifteen of our state constitution (section 224, Burns' R. S. 1894; 224, R. S. 1881), providing that "the General Assembly shall not create any office the tenure of which shall be longer than four years." We approach the consideration and decision of that question fully impressed with the delicacy of the task, and that the well settled rule that requires us to solve all doubts in favor of the action of the legislature is salutary and wholesome; and yet the solemn duty of declaring an act of the legislature or a part thereof, void, because of its plain and unquestionable violation of an inhibition in the constitution, is equally imperative. To permit such an act or a part thereof to escape judicial condemnation, and to stand as law, is fraught with as much danger to the perpetuity of our republican form of government as the overthrow of statutes by judicial power merely because the court doubts their constitutionality. It appears from the facts stated in the complaint, and admitted by the demurrer, that only two of the present five members of the board of park commissioners have a term of office which does not exceed the constitutional limitation of four years. Three of them are serving on a five years' term under section two of the act. If the legislature could not create such an office, under the constitution, then there is no such office and hence no such officer; and as was said in *Clem v. State*, 33 Ind. at page 423, "there was no warrant of law to elect or appoint one, and there could be no such officer *de facto*, much less *de*

Indianapolis Brewing Company v. Claypool et al.

jure." But counsel for appellees, admitting the force of the constitutional restriction and the case from which we have quoted, seek to avoid such force by contending that that constitutional inhibition does not apply to the offices in question here, because the framers of the constitution had only in mind and therefore only meant, the restriction to apply to such offices as were at that time in existence, and, there having been no such office then in existence, nor in contemplation as park commissioners, they had no idea, as is contended, of limiting the tenure of such an office, by the restriction mentioned. That argument proves entirely too much if it proves anything. If the framers of the constitution only meant the restriction to apply to offices then in existence, it is fair to say that it was not intended to apply to any, because the restriction is that the General Assembly shall not create any office, etc. The creation of a thing already in existence is an impossibility. It is not likely that the framers of the constitution meant to provide for such an absurdity. They meant just what they said, and said just what they meant, namely that the legislature "shall not create any office the tenure of which shall be longer than four years." That language embraces every office the legislature could possibly create or attempt to create by legislative enactment, whether it was such as was then in existence or such as was entirely new and unheard of before. The construction contended for by the appellees would amount to a complete abrogation of the constitutional restriction by judicial and legislative action. It would enable the legislature to enact laws providing new officers in the place of all offices then in existence outside of those mentioned in the constitution, giving to each a life tenure. In our opinion no such intent was entertained by the

Indianapolis Brewing Company v. Claypool et al.

authors of the constitution. It is further contended that the park commissioners are required to serve without compensation. Appellee's counsel do not say that that circumstance deprives the commissioners of their character as officers. If it did, appellees would fail, because the act provides some compensation for them, namely, their expenses. It is the creation of an office with a certain tenure that is forbidden. Webster defines the word "office" to be "a special duty, trust, or charge, conferred by authority and for a public purpose; an employment undertaken by the commission and authority of the government, as civil, judicial, executive, legislative, and other offices."

Burrill's Law Dictionary defines the word "office" to mean "A position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a place of trust." From these definitions, and we think they are correct, it is quite apparent that compensation is not indispensable to the existence or creation of an office within the meaning of the constitution. So that the office of park commissioner is an office, within the meaning of the constitutional restriction quoted.

It is next contended in avoidance of the applicability of the constitutional restriction, that four members of the board were appointed in 1895, whose terms of office will not expire until January 1, 1899, and as contended by appellees according to the provisions of the act, "are, and always have been, a legal board," a majority of the board constituting a quorum, and authorized by section six to take action that is binding. We are unable to perceive the force of this contention or understand the same. If it has any force it must be derived from facts not alleged in, nor disclosed by the

Indianapolis Brewing Company v. Claypool et al.

complaint. This being a case where a judgment was rendered upon demurrer to the complaint and that ruling alone being presented for review, we have nothing to do with any other facts than those alleged in the complaint, and such facts as the law requires us to take judicial cognizance of. It requires us to take judicial notice of the existence and terms of the statute and the constitution.

The facts are disclosed in the complaint that in the spring of 1895, soon after the passage of the act in question the mayor of Indianapolis appointed five park commissioners to serve one, two, three, four, and five years, respectively, from January 1, 1895. That made the term of the one-year commissioner expire on January 1, 1896, and his successor then appointed, and now in office, under the provisions of section two of the act, under a term of five years, running till January 1, 1901. The term of the two-year commissioner appointed in 1895 expired January 1, 1897, when he was reappointed as his own successor, and is now in office, the term of which, under section two of the act, and his reappointment, is five years, expiring January 1, 1902. And the term of the five-year commissioner appointed in 1895, and now in office, expires January 1, 1900, making, according to the allegations of the complaint, three of the defendants in office under a five-year term or tenure, by virtue of section two of the act. Appellees' contention that four of the members appointed in 1895 hold four-year terms, and therefore are and always had been a legal board under section six, making a majority a quorum authorized to do binding acts, is contrary to the facts alleged in the complaint, even if that fact, would constitute such majority a legal board.

It is next contended that section two is valid because the constitutional inhibition only operates to

Indianapolis Brewing Company v. Claypool *et al.*

limit the terms of the several park commissioners to four years, respectively. It is tacitly conceded that, if the restriction cannot be obviated in this way, section two must fall, as a palpable violation of the constitution. This ground of upholding that part of the section other than the tenure clause is based on the familiar principle in constitutional law that a statute may be good in part, and in part void, because unconstitutional. That part fixing the term at five years, it is in effect insisted, may be declared void, and the balance of the section stand. To support this contention, counsel quote from *Clem v. State, supra*, as follows: "The question is as to the application of this restriction. Does it in the case in hand render the creation of the office a void act? * * * But we are of opinion that the restriction cannot be held to apply where, as in this case, no tenure is fixed. The preceding part of the section provides, that 'when the duration of any office is not provided for by this constitution it may be declared by law; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment.' This language seems to be conclusive in support of the position that an office may be created by law though its duration be not fixed, as in this case. If fixed at a longer term than four years by the act creating it, there would then be a question whether the creation of the office was not void, or whether valid, but its tenure limited to four years by force of the constitution." This is as much, if not more, against appellees' contention than for it. It not only suggests the query whether the question raised by their contention shall be decided for or against them, but it furnishes a basis for reasoning out the question against appellees. It is to be observed that it is not the tenure of more than four years that is prohibited, but it is the creation of an

Indianapolis Brewing Company v. Claypool et al.

office the tenure of which shall be longer than four years. The forbidden act is the creation of the office of the particular description given, as much as the inhibition of more than four years' tenure. It would seem, therefore, that it is the creation of the office that is void, as much, if not more, than the act of affixing a tenure of more than four years. If the language were: "No office created by the legislature shall have a longer tenure than four years," we should have a very different question to decide.

Our attention has been called to a decision of the supreme court of Kansas upon a constitutional provision precisely like our own, wherein it is claimed a different conclusion was reached by that court. *Lewis v. Lewelling*, 53 Kan. 201, 36 Pac. 351. The report of the case is so meager that it is not easy to understand the reason, if there was any reason, for the conclusion indicated. The only reason assigned for the conclusion reached is the decision of the supreme court of California cited. The whole of what the supreme court of Kansas said upon that branch of the case is as follows: "The provision in section 4 permitting officers to be commissioned for a term of five years is violative of section 2, article 15, forbidding the legislature to create any office the tenure of which is longer than four years. Military officers are within the provisions of the constitution. Where the statute fixes a term of office at such a length of time that it is unconstitutional, the tenure thereof is not declared, and therefore the office is held during the pleasure of the appointing power. *People v. Perry*, 79 Cal. 105, 21 Pac. 423."

No reason is assigned by the Kansas supreme court why the constitutional inhibition forbidding the Kansas legislature to create any office of a certain tenure did not render the forbidden act void. The forbidden

Indianapolis Brewing Company v. Claypool *et al.*

act there, as here, was the creation of the office, in plain language of unmistakable meaning. That great jurist, Judge Cooley, in his *Constitutional Limitations*, with great clearness and force, states the rule for construing the language of a constitution, at pages 69 and 70, thus: "The object of construction, as applied to a written constitution, is to *give effect to the intent of the people in adopting it*. In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere. 'Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words de-

Indianapolis Brewing Company v. Claypool et al.

clare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning.'” The constitution like our own, in this particular contains no contradiction of the plain meaning of the words employed, and such meaning involves no absurdity; and hence, by this salutary rule, the language ought to be given its full force and meaning.

As the Kansas supreme court gave no reason why such language should not be given its full force and meaning, except to cite the California case, we must assume that the reasoning in that case is the only reason on which the Kansas court reached its conclusion. But, when we examine the case, we find that it furnished no reason whatever for the Kansas decision, on account of the radical difference in the constitutional provisions of California and Kansas. The provision as it stood in both the old and new constitution of California received the consideration of the California supreme court in that case. That in the old reads thus: “Nor shall the duration of any office not fixed by the constitution ever exceed four years;” and in the new constitution it was: “But in no case shall such term exceed four years.” This language in no way forbids the creation of the office with a tenure exceeding four years, but simply limits the tenure of all offices created by the legislature to four years. This language fully justified the conclusion reached by the California supreme court. But it furnished no reason whatever for the decision of the Kansas supreme court, under a constitution, as ours, forbidding the creation of the office with a tenure exceeding four years. If the act was forbidden then, it was, in so far as it created the office, in violation of the constitution. It therefore appears that the Kansas decision is in plain violation of the constitution of that state and

Indianapolis Brewing Company v. Claypool *et al.*

rests on no reason whatever. Such a decision we ought not and cannot follow.

It would seem to follow that so much of sections one and two of said act as creates the office of park commissioner with a tenure of five years is in violation of the constitution, and void. All the balance of the act is inoperative, for the sole reason that there are no instrumentalities left with which to carry them into operation and effect.

It results that the defendants are doing acts affecting the plaintiff's rights that they have no authority of law to do, because there is no such office, the duties of which they claim to be exercising. Hence, the complaint stated a good cause of action, and the circuit court erred in sustaining a demurrer thereto.

The judgment is reversed, with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

DISSENTING OPINION.

MONKS, J. (dissenting).—I dissent from the conclusion reached in the prevailing opinion. It is held by a majority of the court that said act is unconstitutional, because it violates section two, article fifteen of the constitution (section 224, Burns' R. S. 1894, 224, R. S. 1881), which provides that "When the duration of any office is not provided for by this constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the General Assembly shall not create any office the tenure of which shall be longer than four years." It is clear that members of the park board are within the provisions of said section of the constitution. It is equally clear, I think, that the purpose of said section was to prohibit the legislature from fixing the tenure of an office

Indianapolis Brewing Company v. Claypool et al.

created by that body at a longer period than four years. The duration or tenure of office, and not the creation of the office by the legislature, is the subject of said section. Fixing the tenure of an office at more than four years is prohibited by said section, but not the creation of the office.

In *Lewis v. Lewelling*, 53 Kan. 201, 36 Pac. 351, the legislature had passed an act providing for the organization and government of the militia of the state, and creating and fixing the tenure of office of certain military officers at five years. Section two, article fifteen, of the Kansas constitution of 1859, is substantially the same as section two, article fifteen, of the constitution of this State. The court held, not that the creation of the office was unconstitutional, but that fixing the tenure of office at more than four years was unconstitutional. The court said: "The provision in section 4 permitting officers to be commissioned for a term of five years is violative of section 2, article 15, forbidding the legislature to create any office the tenure of which is longer than four years. Military officers are within the provisions of the constitution. Where the statute fixes a term of office at such a length of time that it is unconstitutional, the tenure thereof is not declared, and therefore the office is held only during the pleasure of the appointing power."

It is evident that section two of the act in controversy, so far as it fixes the tenure of office of the members of said park board at five years, is unconstitutional. It is settled, however, by a long and unbroken line of decisions in this State, that if the unconstitutional portions of a statute can be stricken out, and still leave a complete statute, the unconstitutional portions must be regarded as eliminated, and the remainder of the statute must be enforced. *Taggart, Aud., v. Claypool*, 145 Ind. 590, 593, 594, 32 L. R. A.

Indianapolis Brewing Company v. Claypool *et al.*

586; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313; *Smith v. McClain*, 146 Ind. 77, 89; *City of Indianapolis v. Bieler*, 138 Ind. 30, 38; *Ingerman v. Noblesville Township*, 90 Ind. 393, 396; *State, ex rel., v. Gorby*, 122 Ind. 17, 29; *State, ex rel., v. Blend*, 121 Ind. 514, 521, 522; *State v. Newton*, 59 Ind. 173; *Clark v. Ellis*, 2 Blackf. 8.

The legislative purpose in passing the act in controversy was to create a park system for cities of over 100,000 population, and the tenure of office of the members of the board of park commissioners was a mere incident. That system could exist with a park board whose tenure of office was not fixed, as well as if the tenure was fixed at four years or less. Striking down the part of section two fixing the tenure at five years does not change or interfere with the provision of any other section, or change the meaning of any other section of said law, but leaves a complete statute capable of enforcement. The other sections mean the same, and will have the same effect after that part of section two fixing the tenure of office is eliminated as before. The other sections in no way depend upon that part of section two, but are entirely independent of the same. The purpose being to create a park system, the tenure of office was not important, and it can not properly be said that the legislature would not have passed said act if the tenure of office had not been fixed at five years. Much rather is it to be presumed that the act would have passed if the tenure had been fixed at four years or less, or had not been fixed at all.

If it can be said in this case that the legislature would not have adopted said park act without the eliminated portion of section two, this court should have said in all the other cases cited above that the acts there in controversy would not have been passed

The Citizens State Bank of Noblesville *et al.* v. Harris.

if they had known that the parts or sections in controversy would be adjudged unconstitutional. Many, if not all the cases cited above, go further to sustain laws, parts of which were declared unconstitutional, than is necessary in this case.

It follows, therefore, that, eliminating the part of section two of said act concerning the tenure of office, the remainder of the act is constitutional. Considering said act with the unconstitutional part eliminated, the legislature has failed to fix the tenure of office of the members of the park board, and that, therefore, the term of office, under section two, article fifteen, of the constitution, is during the pleasure of the mayor. *People v. Perry*, 79 Cal. 105, 114, 115, 21 Pac. 423.

The judgment should be affirmed.

JORDAN, J., concurs.

THE CITIZENS STATE BANK OF NOBLESVILLE ET AL.
v. HARRIS.

[No. 18,129. Filed December 17, 1897.]

EXEMPTIONS.—Sales.—Judgment Liens.—Quieting Title.—Where the entire estate of a resident householder, exclusive of valid mortgage liens, does not exceed in value \$500.00, he may sell or dispose of any or all of his property, and the purchaser thereof will take it free from the lien of judgments founded on contract, or the lien of an execution that may have issued thereon, and an action may be maintained by the purchaser to quiet title of such real estate against the lien of such judgments, provided suit is commenced for that purpose before the real estate is sold under the judgments.

From the Hamilton Circuit Court. *Affirmed.*

A. F. Shirts and *L. S. Baldwin*, for appellant.

William Booth and *Gavin, Coffin & Davis*, for appellee.

JORDAN, J.—By this appeal the Citizens State Bank of Noblesville, Indiana, assails the judgment of the

149	208
149	515

149	208
154	170
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149	208
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149	208
167	647

The Citizens State Bank of Noblesville *et al. v. Harris.*

lower court quieting the title of the appellee to certain described lands. The facts alleged in the complaint of appellee are substantially as follows: On January 8, 1883, John Glassar became the owner of the real estate in controversy, situated in Hamilton county, Indiana. On January 3, 1891, said Glassar, together with his wife, executed a mortgage on the land to W. H. English to secure a promissory note of \$800.00, which mortgage was duly recorded in the recorder's office of said county, and became a valid lien on the land. On February 8, 1894, he executed another mortgage on the same tract to N. P. Glassar, to secure a debt or note of \$700.00, and this mortgage was duly recorded, and became a lien on said real estate. On February 21, 1894, the appellant, the Citizens Bank recovered a judgment against said John Glassar, in the Hamilton Circuit Court, on a promissory note for the sum of \$161.00 and cost. May 15, 1885, Nora E. Trout also recovered a judgment in the same court against Glassar upon a contract for \$50.00. March 15, 1894, Thomas Davis recovered a judgment in said court against Glassar upon a promissory note for \$248.00 and cost. On April 27, 1895, Glassar sold, and by a warranty deed, in which his wife joined, conveyed the real estate in question to appellee, James H. Harris. The land at the time of said sale and conveyance was of the value of only \$200.00, over and above the two aforesaid mortgage liens and taxes due thereon. At the time of the sale and conveyance John Glassar was, and for ten years prior thereto had been, a *bona fide* resident householder of said county and State, and so continued to be at the commencement of this action. On the 27th day of April, 1895, and for six months prior thereto, and continuously since that date, the personal property owned and held by Glassar

The Citizens State Bank of Noblesville *et al.* v. Harris.

did not exceed \$50.00 in value. That said real estate, subject to said mortgage liens, and his said personal property of the value of \$50.00, constituted the entire property and estate, both real and personal, owned and held by Glassar at the date of the sale of the real estate and prior thereto; all of which, at that time, in the aggregate, was less than \$600.00 in value. Said realty at the time conveyed to appellee was worth \$200.00 and no more, when valued subject to the said mortgage liens. The complaint also alleged that there was due and unpaid, as purchase money for the land from plaintiff to Glassar, who was made a party defendant, the sum of \$175.00, and no more, and he paid that amount into court, to be paid as directed by the court, to the person legally entitled thereto. The complaint further averred that the defendants, the judgment creditors, were claiming an interest and right to said real estate, on account of their judgments, adverse to the plaintiff, and that said claim was pretended and unfounded, but served to cast a cloud upon the title of the plaintiff to the land in controversy, and he demanded that the court adjudge to whom the remainder of the purchase money be paid, and that his title be quieted, etc. The bank filed an answer in denial, and also set up affirmative matter. The defendant Glassar filed a cross-complaint against the appellant and the appellee, in which he admitted the sale of the forty acres of land in dispute to the appellee, and he alleged that the land, when he sold it, was incumbered by the two mortgages, as averred in appellee's complaint. He also set up in like manner as in the complaint alleged, the fact that he was a resident householder, and that on April 27, 1895, when he sold and conveyed the land to the plaintiff, it was not worth to exceed \$200.00, over and above said mortgage liens; and that all of his property, both real and

personal, owned and held by him at the time of the sale, and since, did not exceed in value \$300.00; and he filed with his cross-complaint a verified schedule of all his property of every description whatever, including the money paid into court by the plaintiff, which aggregated in value less than three hundred dollars; and he asked that the balance of the purchase money paid into court by the plaintiff be adjudged exempt, and that the court order the same paid to him, and for all other relief. Appellant unsuccessfully demurred to the complaint and the cross-complaint, and upon the issues joined, the cause was tried by the court, and a judgment was rendered quieting appellee's title to the land, and directing that \$158.00 of the money brought into court by appellee be paid over to the cross-complainant, under his claim of exemption as a resident householder.

The questions presented for our determination relate to the sufficiency, on demurrer, of the facts averred in the complaint and cross-complaint to entitle the parties to the relief claimed by each. Counsel for appellant in their brief say: "We are aware of the fact that land may be sold where judgment liens are resting on it, and the purchaser may hold it free from the liens; but in all cases the value of the land, added to the value of the personal property, must be less than six hundred dollars. We know of no case extending this rule to lands which, when the value of the land, without reference to the liens, added to the personalty, exceeds six hundred dollars in value." Courts give a liberal construction to the law that exempts from sale on execution the property of a resident householder, as such an act is intended to protect the insolvent debtor and his family so that they may, in the language of our constitution, "enjoy the necessary comforts of life." Guided by this principle,

The Citizens State Bank of Noblesville *et al.* v. Harria.

this court has not limited the application of our exemption statute to cases only which fall directly within its strict letter, but have applied it to all such as come within the spirit and equity of the law, so as to promote and secure the object intended. Where a judgment is founded on contract, the rule in this State is that the judgment debtor, if he is a resident householder, and his entire estate, real and personal, of every kind and description whatever, within and without the State, does not exceed in value the amount which, under the law, he is authorized to claim as exempt from sale on such judgment, he may, before any such sale occurs, sell or dispose of any or all of his property, and the purchaser or person to whom the property passes, will take it free from the lien of the judgment, or the lien of any execution that may have been issued thereon. As to any real estate so disposed of by such judgment debtor, the person to whom it has been conveyed may maintain an action to quiet his title against the lien of the judgment, provided he commences his suit for that purpose before the real estate is sold under the judgment. This doctrine is fully sustained by the following decisions, some of which expressly affirm it, and others indirectly support it: *Barnard v. Brown*, 112 Ind. 53; *Dumbould v. Rowley*, 113 Ind. 357; *Ray v. Yarnell*, 118 Ind. 112; *King v. Easton*, 135 Ind. 353; *Moss v. Jenkins*, 146 Ind. 589; *Isgrigg v. Pauley*, 148 Ind. 436; *Coppage v. Gregg*, 1 Ind. App. 112.

Section 746, Burns' R. S. 1894 (734, R. S. 1881), which provides the mode of ascertaining the value of property levied on by the sheriff, expressly directs that the appraisers shall "proceed to appraise the property according to its cash value at the time, deducting liens and incumbrances." The facts in this case, on any view, disclose that the land was not worth

to exceed \$1,800.00 at the time of the sale to the appellee, and, if this value be subjected, as it must be, to the total amount of the two mortgages which incumbered it at the time appellant recovered its judgment, the value of Glasser's interest in the land at the time of the sale would not exceed \$300.00. If to this we add his personal estate, which at the same time did not exceed \$75.00, his entire estate would not exceed in value \$375.00, an amount far below that to which he would have been entitled under his claim of exemption had the appellant, on the day he conveyed the land to appellee, attempted to enforce on execution a sale of his property in satisfaction of its judgment. In this estimate of Glasser's interest in the land, the inchoate interest of his wife therein has not been taken into consideration. This would still further decrease that of her husband. See *Taylor v. Duesterberg*, 109 Ind. 165; *Isgrigg v. Pauley*, *supra*. In fact, the only interest which Glasser, the debtor, had in the real estate in question at the date appellant obtained its judgment, and to which its lien could have in any manner attached, and all that he held at the time he conveyed it to the appellee was the equity of redemption; and such interest or right was all, even though his pecuniary circumstances had been better than they were, that appellant could have subjected to a sale upon its judgment, and it was the value of this interest in the land which was to be ascertained upon the question of the debtor's exemption; and this, as we have seen, did not exceed \$300.00. Section 764, Burns' R. S. 1894 (752, R. S. 1881); *Julian v. Beal*, 26 Ind. 220. In a sense, in respect to his interest in the land, the mortgages executed by him upon it might be considered as an alienation of it to the extent of the indebtedness secured thereby. *Vinnedge v. Shaffer*, 35 Ind. 341; *U. S. Saving Fund, etc., Co. v. Harris*, 142 Ind. 226.

Ritchey et al. v. Welsh.

But we need not further extend this opinion in determining the issue in this cause, for the same question, substantially, as here involved was decided adversely to the claim of the appellant in *Barnard v. Brown, supra*. In that case the value of the land in dispute, subject to a mortgage lien thereon, together with the value of the personal estate of the judgment debtor, did not aggregate \$600.00 at the time the land was sold. It was there held that the debtor, being entitled to have the land exempted at the time of the conveyance, might sell and convey it, and that he and his grantee could maintain a joint action to have the title of the latter quieted and freed from a judgment incumbrance existing against the real estate at the time of the sale; and that the property of the former, owned by him at such time, might be set off to him as exempt from execution; and that no previous demand was necessary in order to maintain the action. The decision in that case must be accepted as materially controlling the question as presented, under the facts in the case at bar. The complaint and cross-complaint were substantially sufficient, and the court did not err in overruling the demurrers thereto.

Judgment affirmed.

RITCHEY ET AL. v. WELSH.

[No. 18,157. Filed January 4, 1898.]

149	214
159	564
149	214
166	573

EASEMENTS.—Private Roads.—Way of Necessity.—Partition.—Where in the partition of real estate the portion set off to one of the parties is not accessible to a highway without passing over lands partitioned to another, and no provision is made in such proceedings for any right of access to such highway, such right of way attaches to the land the same as if express provision had been made therefor in the report of the commissioners and decree of court. *p. 220.*

SAME.—Private Roads.—Way of Necessity.—Where one having an easement in the lands of another for a private way, and the same is to be located for the first time, no prior use thereof having been

Ritchey *et al.* v. Welsh.

made, the owner of the land over which it is to pass has the right to choose it, provided he does so in a reasonable manner; but if the owner of the land fail to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate, and when once selected it cannot be changed by either party without the consent of the other. *pp.* 220, 221.

SAME.—*Way of Necessity.—Partition.*—A party to a partition proceeding may have an easement in lands partitioned to another in such proceeding for a way of necessity across such land to a public highway, but he is not by virtue thereof entitled to an easement for such purpose in other lands set off to such person in a prior proceeding in partition of lands of another common ancestor. *pp.* 221, 222.

From the Jasper Circuit Court. *Affirmed.*

R. W. Marshall, W. E. Uhl and E. B. Sellers, for appellants.

Frank Foltz, Charles G. Spitler and Harry R. Kurrie, for appellee.

MONKS, J.—This action was brought by appellee against the appellants, to enforce a way of necessity. The demurrer to the complaint was overruled. The court made a special finding of facts, and stated its conclusions thereon in favor of appellee, to each of which appellants excepted. Final judgment was rendered in favor of appellee.

The errors assigned, and not waived, call in question each conclusion of law, and the action of the court in overruling the demurrer to the complaint.

It appears from the special finding that Mary C. Ritchey died intestate, the owner of a body of land bounded on the west and south by a highway; that afterwards, in 1887, partition was made of said real estate, so that the real estate allotted to each was bounded on the west or south by said highway. The eighteen acres set off to appellant, Osiander K. Ritchey, was thirty-six rods wide, north and south, and divided the fifty-three acres set off to Samuel W.

Ritchey et al. v. Welsh.

Ritchey, husband of said deceased, from the twenty-nine acres set off to appellee. Afterwards said Samuel W. Ritchey died the owner of said fifty-three acres, and in 1891, in an action for partition the same was divided in such a manner that the part set off to appellant, Osiander K. Ritchey, was between the public highway and the part set off to appellee, so that the tract set off to appellee could not be reached from a public highway over said fifty-three acres, except by crossing over the part thereof set off to said Osiander K. Ritchey. No mention was made in said partition proceedings of a way from appellee's tract to any highway. Samuel W. Ritchey occupied said fifty-three acres from the time the same was set off to him until his death, and entered from the highway through a gate on the part of said land afterwards set off to said appellant, Osiander K. Ritchey, going over the land in the most convenient route. After the partition of the fifty-three acres, a gate was still maintained upon said land at the highway for the convenience of appellee, she going thence north to a point west of the southwest corner of her said tract; thence east to her land. The part of the fifty-three acres set off to appellee was not fenced until 1893, when she erected a gate at the southwest corner thereof, and has since used said gate, and a route extending directly west therefrom to the east line of the southwest quarter, and thence south to the gate at the highway. The entire way so used being upon the part of said fifty-three acres set off to appellant, Osiander K. Ritchey, and with his consent.

Appellant, Osiander K. Ritchey, before the commencement of this action, offered to appellee the privilege of passing over the eighteen acres which were set off to him in the partition of his mother's land, in 1887, from north to south. By the way so offered,

appellee could go from the twenty-five acres set off to her in the partition of her father's land in 1891, to the twenty-nine acres set off to her in the partition of her mother's land, in 1887, which last named tract was bounded on the west by a highway.

Appellants insist that the court erred in overruling the demurrer to the complaint, and in each of the conclusions of law, because—"First, a right of way of necessity does not arise out of partition proceedings; second, appellee had another way offered before this action was commenced; third, appellants had selected another way."

It is settled law that if one conveys a part of his land in such form as to deprive himself of access to the remainder, unless he goes across the land sold, he has a way of necessity over the portion conveyed. This is because the law presumes an understanding of the parties that the one selling a portion of his land shall have a legal right of access over the part sold to the remainder, if he cannot reach it in any other way. If the the part conveyed is in such form that the grantee cannot reach the same except over the part not conveyed, such grantee has a way of necessity thereto over the land of the grantor, not conveyed, for the reason that the law presumes that one would not sell his land to another without an understanding that the grantee should have a legal right of access thereto over the part not conveyed. *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61, 62, and cases cited; *Stewart v. Hartman*, 46 Ind. 331, 341, 342; *Logan v. Stogsdale*, 123 Ind. 372, 376, 377, 8 L. R. A. 58; *Ellis v. Bassett*, 128 Ind. 118, and cases cited; *Kimball v. Cochecho Railroad*, 27 N. H. 448, 59 Am. Dec. 387; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43, 44; *Pinnington v. Galland*, 9 Exch. 1; *White v. Bass*, 7 Hurl. & Norm. 722; Wash-

Ritchey et al. v. Welsh.

burn's Easements, 164, 166. These presumptions prevail over the ordinary covenants of a warranty deed. *Brigham v. Smith*, 4 Gray 297. The rights of the grantor and grantee would not be different or any more extensive if by the terms of the deed express provision was made for such way of necessity. *Viall v. Carpenter*, 80 Mass. 126; *Blum v. Weston*, 102 Cal. 362, 36 Pac. 778, 41 Am. St. 188; *Brigham v. Smith*, *supra*. The law thus giving effect to such grant according to the presumed intent of the parties.

Appellant contends that this right of a way of necessity can only exist when there is a grant by one owning both the dominant and servient estate. This right, however, has not only been raised between parties to the conveyance of one or more parts of land, when the part granted or retained can only be reached over the other part, but also where a part of a tract of land has been sold or set off on execution or by an executor or administrator. *Ellis v. Bassett*, *supra*; *Pernam v. Wead*, *supra*; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107; *Russell v. Jackson*, 2 Pick. 574; *Schmidt v. Quin*, 136 Mass. 575; *Smyles v. Hastings*, 22 N. Y. 217; *Howton v. Frearson*, 8 T. R. 50. It has been held that such a right exists in partition proceedings in favor of any tract allotted which is not accessible except over the part or parts of the tract allotted to others. *Viall v. Carpenter*, *supra*; *Blum v. Weston*, *supra*. See, also, Goddard's Law of Easements (Bennett's ed.), 348.

Under the authorities it is clear that if the parts of said real estate allotted to appellant, Osiander K. Ritchey, and appellee, respectively, had been conveyed or devised to them by Samuel W. Ritchey, their common ancestor, a way of necessity would have been created in favor of the part conveyed or devised to appellee.

The reason for the doctrine of a way of necessity is thus stated in *Collins v. Prentice*, *supra*: "And although it is called a way of necessity, yet in strictness, the necessity does not create the way, but merely furnishes evidence as to the real intentions of the parties. For the law will not presume, that it was the intention of the parties, that one should convey land to the other, in such a manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder." The reasons given to support a way of necessity, in case of a grant, support such a rule with equal force, when there is partition of land by deed or by a proceeding in court.

In *Viall v. Carpenter*, *supra*, the lands of a testator were so divided by proceedings in the probate court that parcels of land set off to some of the devisees were not accessible from the highway without crossing one of the parcels set off to other devisees. The committee making the division made no express provision concerning the parcels of land which they assigned in severalty. The court held that the right of way of necessity attached to the lands assigned without any express provision therefor. The court said: "The court do not doubt that, by the division of the real estate of Thomas Carpenter, deceased, in the probate court, his heirs, to whom specific portions of that estate were assigned, acquired a right of way to those portions over other lands which had been their ancestors. And whether they acquired this right solely as of necessity, without any provision therefor in the language of the division, or by the effect of the language used by the committee in making the record of the division, seems to us to be unimportant. * * A reservation, in terms, of 'a way of necessity,' would confer no further right than would be conferred by operation of law, without those words."

Ritchey *et al.* v. Welsh.

In *Ellis v. Bassett, supra*, a part of the land of an estate fronting on the highway was set off to the widow in a proceeding for partition, and afterwards the administrator, by order of court, sold the remainder. It was held that the purchaser had a right of way of necessity over the part set off to the widow. This court said: "A right of way, upon a severance of the estate by partition between heirs, sometimes arises where it would not exist in case of a conveyance of one portion of the premises."

Blum v. Weston, supra, fully sustains our conclusion that the doctrine of a way of necessity applies in partition of lands made by deed, or by proceedings in court.

The presumption is, unless the contrary clearly appears from the record in the partition case, that the shares were allotted with the understanding that the parcel allotted to appellant, Osiander K. Ritchey, was subject to the easement of a way of necessity in favor of the parcel set off to appellee. Appellee's right to a way of necessity is the same as if provision had been made therefor in the report of the commissioners and decree of the court. *Vaill v. Carpenter, supra*; *Blum v. Weston, supra*.

Appellants contend that they had the right to choose where the way should be located. When no prior use of the way has been made, and the same is to be located for the first time, the owner of the land over which the same is to pass has the right to choose it, provided he does so in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate. But if the owner of the land fail to select such way when requested, the party who has the right thereto, may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate. *Holmes v. Seely, 19 Wend. 507, 510; Russell v. Jackson, supra; Capers v. Wilson,*

Ritchey *et al.* v. Welsh.

3 M'Cord, 170; Goddard's Law of Easements (Bennett's ed.), 348, 350. When the way is once selected it cannot be changed by either party without the consent of the other. *Nichols v. Luce, supra*; *Holmes v. Seely, supra*; *Morris v. Edgington*, 3 Taunt. 23; Goddard's Law of Easements (Bennett's ed.) 351.

It is shown by the special finding that Samuel W. Ritchey, the one from whom said appellant and appellee inherited their respective interest in said fifty-three acres of land, entered upon the part thereof afterwards set off to appellant Osiander K. Ritchey through a gate at the highway going thence over the land on the most convenient route; that after the partition was made appellee had access to the twenty-five acres set off to her over the part of said fifty-three acres set off to said appellant on the route set forth in the special finding, and that she erected a gate upon her said twenty-five acres where she entered thereon from said way, and that the way was so used with the consent of said appellant. This was clearly a selection of the way over said appellant's land to the land of the appellee by the agreement of both parties. The way, having been selected and used by the agreement of both parties, said appellant could not afterwards, without appellee's consent, change the route, and require said appellee to use the way offered over the eighteen acres set off to him in the partition of his mother's land in 1887. Appellee was not entitled to a way of necessity over said eighteen-acre tract, which divided her twenty-five acres from her twenty-nine acres, for the reason that it was no part of the estate owned by said appellant, and appellee as tenants in common. She would have no more right to insist on a way of necessity over land of said appellant, other than that inherited by them from their father, than one receiving a grant of land from another could claim

Ritchey et al. v. Welsh.

a way of necessity over the land of a stranger. Even if there had been no selection of a way by both or either of said parties, we do not think said appellant could compel appellee to accept a private way over said eighteen-acre tract. Said appellant could not deprive appellee of her right to a way of necessity over the land set off to him by offering her a private way over other lands owned either by himself or others. If he had opened a public highway, running from the existing highway over said eighteen-acre tract, or any other land, so that appellee could thereby have access to the twenty-five acre tract, there would have been no necessity for a way. But no such case is presented by the facts found.

Appellants next insist that the complaint is to enforce an oral contract between said appellant Osiander K. Ritchey and appellee for a private way, made pending a petition for partition, and that the special finding does not find that there was such an agreement. It is true that the complaint alleges that when the commissioners filed their report of the partition of the lands of Samuel W. Ritchey, said appellant and appellee agreed that appellee should have a private way from the land set off to her over the land set off to said appellant to the highway, but, disregarding the allegations concerning such agreement, the averments were sufficient to entitle appellee to a way of necessity over the lands set off to appellant.

The cause was tried, and a judgment rendered, upon the theory that the complaint sought to enforce a way of necessity. There was no error in the court so treating the complaint.

It follows, therefore, that the court did not err in its conclusions of law, nor in overruling the demurrer to the complaint.

Judgment affirmed.

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

BISHOP v. STATE, EX REL. GRINER, PROSECUTING ATTORNEY.

[No. 18,352. Filed January 4, 1898.]

CONSTITUTIONAL LAW. — *Construction of Constitution.* — Words or terms used in a constitution which is dependent upon a ratification by the people, must be interpreted in a sense most obvious to the common understanding at the time of its adoption. *p. 230.*

SAME. — *Lucrative Office.* — *Constitution Construed.* — The term "deputy postmaster," as used in section 9, article 2 of the constitution, which provides against the same person holding more than one lucrative office at the same time, was, by the framers of the constitution, understood and intended to mean the office of postmaster as now denominated. *pp. 226-231.*

SAME. — *Acceptance of Second Incompatible or Lucrative Office Forfeits First.* — Where the incumbent of a public office accepts and is inducted into a second office that is incompatible with the first, or where both are lucrative offices within the meaning of section 9, article 2 of the constitution, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first office. *pp. 231-233.*

TOWNSHIP TRUSTEE. — *Lucrative Office.* — The office of township trustee is a lucrative office. *p. 232.*

PLEADING. — *Action to Oust Public Officer Who Accepts Second Lucrative Office.* — *Sufficiency of Information.* — An information, under section 1145, Burns' R. S. 1894, to oust defendant from the office of township trustee because he had been appointed to and had accepted the office of postmaster in violation of the provision of the constitution, must negative the exception made in favor of a postmaster whose annual compensation does not exceed ninety dollars. *pp. 234, 235.*

From the Jay Circuit Court. *Reversed.*

J. M. Smith and *F. H. Snyder*, for appellant.

W. A. Ketcham, Attorney-General, *D. E. Griner* and *D. T. Taylor*, for appellee.

JORDAN, J. — This action was prosecuted in the lower court upon information in the name of the State, on the relation of the prosecuting attorney, for the purpose of ousting the appellant from the office of township trustee. A judgment of ouster was rendered,

149	233
149	238
149	290
150	462

149	223
155	309
156	153
149	223
e167	566

149	223
169	161

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

from which appellant prosecutes this appeal. The errors assigned are: (1) That the court erred in overruling a demurrer to the information; (2) error in sustaining a demurrer to the answer.

The information charges, substantially, that the defendant, Peter L. Bishop, at the November election of 1894, was elected township trustee of Bear creek township, in Jay county, Indiana, for a term of four years, and that on the 6th day of August, 1895, he duly qualified as such trustee, and entered upon the discharge of the duties of the office; that subsequently, on the 9th day of October, 1896, the defendant was duly appointed and commissioned, by the postoffice department of the United States, postmaster at the village of Bryant, in said county of Jay, for a term of four years, and duly qualified as such postmaster at said time, and entered upon the discharge of the duties thereof, and from said day on has continued to hold said office of postmaster, and discharge the duties thereof. By reason of his accepting and entering upon the discharge of the duties of postmaster at Bryant, it is charged that he forfeited and surrendered the office of township trustee, and the prayer is that he be ousted therefrom. The State bases its right to expel appellant from the office in question on section nine of article two of the constitution, which is as follows:

"No person holding a lucrative office or appointment under the United States, or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as by this constitution expressly permitted: *Provided*, that officers in the militia to which there is attached no annual salary, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative; *And provided, also*, That coun-

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

ties containing less than one thousand polls may confer the office of clerk, recorder and auditor, or any two of said offices, upon the same person." Const. Section 9, Art. 2.

The contention of counsel for appellee is that appellant, by accepting the office of postmaster, when he was an incumbent of another lucrative office created by the laws of this State, violated the above provision of the constitution, prohibiting one from holding two lucrative offices; and it is claimed that by this unlawful act he *ipso facto* surrendered his right to longer hold the office of trustee, and the latter office thereby became vacant. This proposition counsel for appellant to an extent controvert, and they insist that the information is insufficient for its failure to negative the exception in section nine, *supra*, which provides that the office of deputy postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative. Their insistence is that the pleading, upon any view of the case, must affirmatively disclose that the postoffice in question does not fall within this exception. Counsel in their brief say: "When our constitution was constructed and created, there was one 'general postoffice at Washington, D. C.,' and the Postmaster General was in charge and denominated 'postmaster,' and the different offices throughout the country were known, and, in fact, designated, as 'deputy postmasters' by the federal statute. This was true until 1876, when the post-offices were designated as first, second, third, and fourth class, and the lower class only are appointed by the Postmaster General. The others are appointed by the President. In this latter statute the word 'deputy' was dropped, and the offices classified as we have said."

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

In support of their contention they argue that the term "deputy postmaster," as employed in the constitution, means and includes what is now generally denominated "postmaster," and if the State relies on the positive prohibition of the constitution, to oust appellant from the office of trustee, it must, at least, by proper averments show that the annual compensation of the postoffice accepted and held by him exceeded ninety dollars, and thereby place him beyond the exception. On the other hand, counsel for the State contend that the information is sufficient, and in support of their contention they say that at the time of the adoption of the constitution the various postoffices throughout the State were filled by officials denominated and known as "postmasters," and the term "deputy postmaster," as used in the constitution was understood and intended to apply only to a person who was an assistant or deputy of a local postmaster, and for whose acts the latter officer was liable. Therefore they contend that inasmuch as the appellant was a postmaster, and not a deputy postmaster, he in no manner can avail himself of the exception to the prohibition against holding at the same time more than one lucrative office.

We regret that counsel in this appeal have not given us the aid which they should, in our search for a solution of the controversy on the point involved. The inquiry, under the circumstances, is: What is the correct interpretation of the term "deputy postmaster" as employed in section nine of article two of the constitution? The precise question, so far as we have been able to ascertain, has not heretofore been considered by this court. In the cases of *Foltz v. Kerlin*, 105 Ind. 221, and *Wood v. State*, 130 Ind. 364, the interpretation of the term "deputy postmaster," as now involved, does not seem to have been presented nor considered.

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

In order to discover the true sense of the term in question, and thereby determine if the exception in controversy can be of any avail to the appellant in this action, we may properly examine the postal laws of the United States passed by Congress prior to the constitutional convention of 1850, which framed our present fundamental law, and learn from such acts if the term "deputy postmaster" was employed therein, and what duties were assigned to such officer. An inspection of the several acts of Congress relative to the postal affairs of the national government passed between the years 1789 and 1827 discloses that the term "deputy postmaster" was used therein, and in other acts subsequently passed, and that it was intended to, and did apply to the persons who were entrusted with the distribution of the United States mail at the various localities where it was delivered. The Postmaster General was considered the executive head of the postoffice department, and those who served under him at the various towns and cities throughout the country were considered his deputies. See 1 U. S. Stat. at Large, p. 733; 4 U. S. Stat. at Large, p. 298. By the act of July 2, 1836, the President was authorized, with the advice and consent of the Senate, to appoint a "deputy postmaster for each postoffice where the commissions allowed amounted \$1,000.00 and over, for the year ending June 30, 1835. 5 U. S. Stat. at Large, p. 80. In the act of March 3, 1845, the term "deputy postmaster" is again used, and likewise in the act of March 1, 1847, wherein certain pay is directed to be allowed to "deputy postmasters" in lieu of commissions previously paid. 5 U. S. Stat. at Large, p. 732; 9 U. S. Stat. at Large, p. 147. By an act of March 3, 1847, the Postmaster General is directed to establish a postoffice at Astoria, Or., and appoint a "deputy postmaster" to discharge the duties thereof. 9 U. S.

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

Stat. at Large, pp. 189 and 200. By the act of March 3, 1851, the Postmaster General was directed to furnish stamps, etc., to all deputy postmasters. 9 U. S. Stat. at Large, p. 589. Section 6 of the act of March 3, 1853, provided certain regulations in regard to "deputy postmasters." 10 U. S. Stat., pp. 249 and 255. It is apparent, therefore, that the statutes of the United States, passed before and long after the adoption of our constitution, applied the term "deputy postmaster" to each and all persons who were incumbents of and discharged the duties of the postoffices established at the towns and cities throughout the nation. That these officials in a legal sense, to a certain extent, were each considered as the deputy to the Postmaster General, is evident. In fact, in many of the decisions of the federal courts, the term "deputy postmaster" was applied to a person filling a postoffice, and such officer is said to be the deputy of the Postmaster General. *Boody v. United States*, 3 Fed. Cas. 860; *Postmaster General v. Early*, 12 Wheat. 135; *United States v. LeBaron*, 19 How. 73; *Ware v. United States*, 4 Wallace 617 and 625; *Postmaster General v. Furber*, 4 Mason 333, 19 Fed. Cas. 1098. Many other cases may be found to the same effect, but those to which we have referred will suffice for the purpose which we have in view.

Turning to the proceedings of the constitutional convention leading up to the framing and adoption of the section in controversy, and it appears that, after several propositions were made to exempt postmasters where the office did not exceed a certain annual compensation, from the term "lucrative office," the matter of holding more than one lucrative office at the same time, was finally referred to the committee on revision and phraseology, embodied in the following sections:

"Section 6. No person holding any lucrative office

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

or appointment under the United States or this State, shall be eligible to a seat in either branch of the General Assembly: *Provided*, That offices in the militia, to which there is attached no annual salary, shall not be deemed lucrative."

"Section 1. . No person shall hold more than one lucrative office at the same time except as in this constitution expressly permitted: *Provided*, That counties containing less than one thousand polls may confer the office of clerk, and recorder and auditor, or any two of said offices upon one person: *Provided*, however, that the office of postmaster, where the compensation does not exceed ninety dollars per annum shall not be deemed lucrative."

This committee, after giving the question consideration, seems to have consolidated these sections, and prefixed the word "deputy" to postmaster, and incorporated the whole into section nine of article two of the constitution, in which form it was reported to the convention and finally adopted and ratified by the people. Convention Journal, pp. 166, 167, and 527 *et seq.* No reasonable doubt can exist but what the committee on phraseology considered the phrase "deputy postmaster" as the one technically correct and proper to be used, in view of the fact that the postal laws of the United States applied this term to the particular federal officer which the convention had under consideration, and which had been designated in the section referred to the committee as "postmaster." In the debates of the convention, on the question of making a person ineligible to hold more than one lucrative office the term "postmaster" was generally used. Mr. Owen, a member of the convention, speaking on the question in regard to excluding postmasters from holding offices created by the laws of the State, said: "I ask the gentlemen if there is a

Bishop v. The State, ex rel. Griner, Prosecuting Attorney.

single postmaster who receives but ninety dollars a year who is not obliged to do something else for a livelihood? * * * * It is not for the sake of the receipts of the office that the postmaster accepts the office, but for the accommodation of the neighborhood. It is wrong then, in my opinion, to deprive them of the right to be elected to the legislature." Debates on the Constitution, pp. 1423 and 1424. In the address to the people of the State, prepared by Mr. Owen, and unanimously concurred in by the convention, wherein, among other things, the principal changes made in the old constitution under the new one about to be submitted, were pointed out to the electors, is the following: "Postmasters, if their annual compensation be ninety dollars or less, but not otherwise, may be elected members of the legislature." Debates on the Constitution, p. 2042. This announcement or declaration to the electors of the State relative to the provisions of the constitution which was about to be submitted for their ratification, by the men who had just completed the work of moulding and giving it form, certainly must be accepted as revealing what was understood by the term "deputy postmaster," as used in the section in controversy, and the particular officer to which the term was intended to be applied. It is a rule generally asserted that words or terms used in a constitution which is dependent upon a ratification by the people must be interpreted in a sense most obvious to the common understanding at the time of its adoption, in the belief that such was the sense or meaning designed. Cooley, Const. Lim. (6th ed.), pp. 69, 73, 81. Guided by this principle, in the light of the contemporaneous facts and circumstances to which we have referred, and it is plain, we think, that the term in question, according to the common understanding of both those who framed and those who ratified our constitu-

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

tion, was understood and intended to mean the office of postmaster as now denominated, and consequently must be applied to such office. Therefore, if the annual salary or compensation of a postoffice in this State is not in excess of ninety dollars, in that event such office cannot be considered a lucrative one within the prohibition of section nine, *supra*. But, where such compensation exceeds ninety dollars, the office must be held to be lucrative; and, under the positive mandate of the constitution, the incumbent thereof is debarred from holding any other lucrative office created by the constitution or laws of this State. The settled rule of the common law prohibits an incumbent of a public office from holding a second one incompatible with the first, and the acceptance of the second office will, *ipso facto*, terminate his right or title to the first. The authorities affirm that the act of accepting, under such circumstances, the second office, operates as a surrender of the first; and when the officer has been once inducted, under his election or appointment, into the second office, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first office, for it is evident that when a public office once becomes vacant, a former incumbent cannot be restored to it by his own act. *Yonkey v. State*, 27 Ind. 236; *Howard v. Shoemaker*, 35 Ind. 111; *Gosman v. State*, 106 Ind. 203, on p. 208, and authorities there cited; *State v. Bus*, 135 Mo. 325, 36 S. W. 636; *People v. Common Council*, 77 N. Y. 503, 33 Am. Rep. 659; *State v. Goff*, 15 R. I. 505, 9 Atl. 226; Mechem on Pub. Officers, sections 420, 425 and 426; Throop on Pub. Officers, sections 30 and 31; 19 Am. and Eng. Ency. of Law, p. 562u.

The question, however, with which we have to deal in this case, is not one relating to the holding of incompatible offices in defiance of the common law, but re-

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

lates to the holding of one incompatible with the inhibition of the constitution. The doctrine of the common law which we have mentioned, however, is in some respects applicable. The test to be applied is not whether the two offices held by the appellant are incompatible with each other, but are they lucrative ones within the meaning of the constitution. That the office of township trustee is lucrative is settled beyond controversy. *Creighton v. Piper*, 14 Ind. 182; *Foltz v. Kerlin*, *supra*. If the annual compensation of the post office accepted and held by the appellant is over ninety dollars it is manifest that it falls within the constitutional interdiction, and appellant, by accepting it, at the time he was holding that of trustee, violated the fundamental law of the State, and his unlawful act in so doing would produce the same result or effect as does the acceptance by an officer of a second incompatible office under the rule of the common law to which we have heretofore referred. It could not be presumed that appellant intended to violate the constitution by accepting and holding the office of postmaster if it was beyond the exception in question, when he was the occupant of that of township trustee, and the result to be implied from his act in doing so, under such circumstances, would be that he intended completely to surrender and vacate the latter office, and the law would attribute such a surrender as the necessary consequences of the act. 19 Am. and Eng. Ency. of Law, p. 562b; Mechem on Public Officers, section 429; *Dickson v. People*, 17 Ill. 191; *State v. Buttz*, 9 S. C. 156; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538; *State v. DeGress*, 53 Tex. 387; *Davenport v. Mayor*, 67 N. Y. 456; *Hoglan v. Carpenter*, 4 Bush. (Ky.) 89.

Assuming, therefore, that the annual compensation of the postoffice in controversy exceeds ninety dollars,

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

the act of the appellant in accepting it while the incumbent of the office of trustee, would operate as a surrender or resignation of the latter, and it would become vacant to the extent at least that the proper appointing authority could lawfully proceed to fill the vacancy. This rule, we think, is well affirmed by the authorities cited. *Gosman v. State*, *supra*, at p. 208; *Osborne v. State*, 128 Ind. 129.

But counsel for appellant urge in consideration of the fact that appellant subsequently resigned the office of postmaster, as alleged in his answer, consequently this action cannot be maintained. This contention is not tenable. As we have previously said, where the first office is once surrendered or vacated by accepting a second in defiance of law, the officer cannot be restored to any right or title under the first by resigning the second. Counsel refer us, however, upon this question to the cases of *Foltz v. Kerlin*, *supra*, and *DeTurk v. Commonwealth*, 129 Pa. St. 151, 18 Atl. 757, 5 L. R. A. 853. In both of these cases the party was holding the office of postmaster when he accepted and was inducted into the office created by the laws of the State. As the laws of the State could exert no dominion over a federal officer, as an officer, it was therefore said in the first case to be inconceivable, under such circumstances, that the acceptance of an office created by the State could operate to vacate one held under the statutes of the United States. In *Foltz v. Kerlin*, *supra*, Elliott, J., intimated that the incumbent of a post office when installed into that of township trustee, might surrender the office of postmaster and retain that of trustee, but expressly said that both could not be held in defiance of the constitution. In the appeal of *DeTurk v. Commonwealth*, *supra*, in view of the fact that the officer was postmaster at the time he accepted the office of commissioner, under the laws

Bishop v. The State, ex rel. Griner, Prosecuting Attorney.

of the commonwealth of Pennsylvania, it was held that he might resign the former and retain the latter. The facts in these two cases, it will be seen, were just the reverse of those in the case at bar. The question as here presented does not in any manner involve the right of the courts of the State to oust the occupant of a federal office, for in this respect it must be conceded they are utterly powerless. Their right, however, to pass upon the title to an office of one who claims to hold it under the laws of their own jurisdiction, and expel him therefrom, whenever he has vacated it by his act of accepting a federal office, great or small, in violation of the state's constitution, cannot be successfully controverted. Likewise, a state court has the power, as held in the Foltz case, to oust one from an office existing under state laws, when at the time he accepted and was installed into the latter, he was also the incumbent of an office under the authority of the United States, and insists, under such circumstances, in holding both in defiance of the state's constitution.

Having reached the conclusions expressed on the foregoing propositions, we may next proceed to consider and determine the ultimate question: Is the information sufficient, in the absence of any averments, to show that the compensation of the post office in controversy exceeds ninety dollars per annum? We are of the opinion that this question must be answered in the negative. The action is apparently instituted under the second subdivision of section 1145, Burns' R. S. 1894 (1131, R. S. 1881), which provides that: "An information may be filed, etc., whenever any public officer shall have done or suffered any act which, by the provisions of law shall work a forfeiture of his office." The information under this provision of the code must state facts sufficient to show clearly a forfeiture of the office in controversy. *Chambers v. State*, 127 Ind. 365, 11 L. R. A. 613.

Bishop v. The State, *ex rel.* Griner, Prosecuting Attorney.

We have seen that the act upon which the State relies to operate as a forfeiture of the office in dispute was the acceptance by the appellant of a second lucrative office, that of postmaster, contrary to the provisions of the constitution. But, as we have heretofore said, section nine of article two, which forbids the holding of more than one lucrative office, also makes an exception in favor of a postmaster where the compensation of his office is not in excess of ninety dollars per annum. In the absence of any averment to the contrary, a court would be compelled to presume that the office in question was within the exception reserved by the constitution. We are not authorized to presume that the positive command of the law has been violated by appellant, and that he must therefore be subjected to a judgment of ouster. At least, as a matter of pleading, the plaintiff was required to negative the exception made in favor of a postmaster whose annual compensation does not exceed ninety dollars. *Brutton v. State*, 4 Ind. 601, 602; *Shearer v. State*, 7 Blackf. 99; *Howe v. State*, 10 Ind. 423; *State v. Carpenter*, 20 Ind. 219; *Wiley v. State*, 52 Ind. 516; *Burke v. State*, 52 Ind. 522; *State v. Buckner*, 52 Ind. 278; *Meier v. State*, 57 Ind. 386; *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242; *Stevenson v. State*, 65 Ind. 409; Wharton's *Crim. Law* (7th ed.), section 614; Wharton's *Crim. Pl. and Pr.* (9th ed.), section 238 *et seq.*; Wharton's *Crim. Ev.* (9th ed.), section 128; High on *Extr. Rem.*, section 591; Bliss on *Code Pl.*, section 202 *et seq.*; 1 *Greenl. Ev.* (13th ed.), section 79 and note; 1 *Chitty Pl.* (1867), 224; Gould's *Pl.*, chap. 4, section 22; *Shipman Pl.*, p. 33; *Steph. Pl.* (Heard's ed.), p. 443.

From the small population of the town of Bryant, as disclosed by the last federal census, it may be inferred that its post office belongs to the fourth class, the an-

Opp et al. v. Timmons et al.

nual compensation of which, under the postal laws, seems to be fixed and adjusted quarterly by the post office department, and depends, to an extent, on the amount of business done at the office.

For the reason pointed out, the information must be held to be insufficient, and the court therefore erred in overruling the demurrer thereto. The answer of the appellant, which set up his resignation of the post office in question, was no defense to the action, and the demurrer to it was properly sustained.

The judgment is reversed, and the cause remanded to the lower court, with instructions to sustain the demurrer to the information, with leave to amend, and for further proceedings in accord with this opinion.

OPP ET AL. *v.* TIMMONS ET AL.

[No. 18,181. Filed January 5, 1898.]

140	236
164	434
140	236
171	714

HIGHWAYS.—*Establishment Of.—Utility.*—The fact that a highway sought to be established includes a traveled way which otherwise might become a highway by use could not affect the question of utility. *p. 237.*

SAME.—*Utility.*—Existing ways, the condition of population, location of markets, character of soil, and physical features of the locality are proper subjects of inquiry in determining the utility of a highway sought to be established. *p. 237.*

From the Benton Circuit Court. *Affirmed.*

Dawson Smith and *J. M. LaRue*, for appellants.

Daniel Fraser, *Will Isham* and *Chas. M. Snyder*, for appellees.

HACKNEY, J.—This was a proceeding by the appellees for the establishment of a highway in Benton county; the appellants having remonstrated on the ground of inutility, and the appellant Opp claiming

damages. In the commissioner's court and in the circuit court it was decided that the road sought was of public utility, and that Opp suffered no damage by the location thereof. Three questions are argued in this court: (1) Can a new road be laid partly upon an established highway? (2) Can the utility of the new parts of such road be determined by considering only the utility of the whole, including that established? (3) Was the appellant Opp damaged?

Nothing in the petition, remonstrances, reports, or orders discloses the existence of any established way forming any part of that sought to be established. An interrogatory, submitted to the jury in the circuit court, elicited the finding that one-fourth of a mile of the proposed road passes over and upon "a public highway already located, laid out and established." There was evidence that a road had been opened by the landowners, and was in use by the public, at a point near the middle of the proposed line; but that it was a public highway, or that it had been laid out and established as such, we find no evidence, and our attention has been directed to none.

The most, therefore, that can be claimed for the first and second questions discussed is that the proposed road would, in part, pursue a traveled way, whose width, course, and termini had not been established by statutory proceeding. That the present proceeding would establish a highway which otherwise might become a highway by use could not affect the question of its utility.

Existing ways, the condition of population, location of markets, character of the soil, physical features of the locality, etc., are proper subjects of inquiry in determining the utility of a highway, and, no doubt, the existence of the way in use was considered by the jury.

Jackson v. Jackson.

It is conceded, substantially, that upon the question of damages claimed by Opp the evidence is in conflict, and we so find it. We cannot pass upon that conflict. The judgment is affirmed.

JACKSON v. JACKSON.

[No. 18,280. Filed Oct. 15, 1897. Rehearing denied Jan. 5, 1898.]

LIMITATION OF ACTIONS.—Concealment of Action.—Statute Construed.

—To bring a case within the provision of section 801, Burns' R. S. 1894 (300, R. S. 1881), providing that if any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto the action may be commenced at any time within the period of discovery of the cause of action, it must be alleged that some trick or artifice was resorted to, or some material fact misstated to or concealed from the party to prevent the discovery thereof. *pp. 242, 243.*

SAME.—Concealment of Action.—Discovery.—Where the operation of the statute of limitation is suspended by section 801, Burns' R. S. 1894 (300, R. S. 1881), by the concealment of the cause of action, the statute does not begin to run until after the discovery of the cause of action, or from the time the discovery thereof by the exercise of ordinary diligence might have been made. *p. 243.*

SAME.—Concealment of Action.—Fraud.—The concealment of a cause of action within the meaning of section 801, Burns' R. S. 1894 (300, R. S. 1881), arises out of fraud, and while the fraud in a given case may be sufficient to give to the complaining party a right of action, it may not in the same case be also sufficient to serve to conceal the cause of action within the contemplation of the law. *p. 243.*

SAME.—Concealment of Action.—Time of Concealment.—The acts constituting the concealment of a cause of action in such manner as to operate in the suspension of the statute of limitation, as provided by section 801, Burns' R. S. 1894 (300, R. S. 1881), need not be subsequent to the accruing of the cause of action, but may be concurrent therewith, or even precede it, provided that they are of such a character as to operate after the time when the cause of action accrued and thereby prevent its discovery, and were so designed and intended by the concealer. *pp. 243-245.*

SAME.—Concealment of Action.—Sufficiency of Facts.—Pleading.—Reply.—Statute Construed.—In an action for damages based upon alleged false representations made by defendant, a bank cashier, in the negotiation and sale to him by plaintiff of stock of such bank, a reply to an answer pleading the statute of limitation, alleging that

149	238
165	420
149	238
167	620

Jackson v. Jackson.

in such negotiations and sale plaintiff relied upon the statements and representations of defendant in relation thereto, and being requested to keep the particulars of the sale secret did so and soon after moved to another state and some years afterward a rumor reached him that the true value of the stock at the time of the sale was from two to four thousand dollars in excess of the price for which it was sold, that he wrote the cashier several letters concerning same but received no reply, does not state facts sufficient to amount to a concealment of the cause of action within the meaning of section 801, Burns' R. S. 1894 (300, R. S. 1891), and operate in the suspension of the statute of limitation. pp. 246, 247.

SAME.—Concealment of Action.—Where a concealment of the cause of action is pleaded in reply to an answer pleading the statute of limitation, alleging that defendant made false representations concerning the transaction on which the suit was founded, and requested plaintiff to keep the transaction secret, it must also be alleged that plaintiff relied upon the alleged false representations, believing them to be true, and was thereby prevented from making any inquiry or investigation relative to their truth or falsity. pp. 246, 247.

From the Wayne Circuit Court. *Affirmed.*

D. M. Bradbury and *Frank W. Ballenger* for appellant.

John F. Robbins, for appellee.

JORDAN, J.—On January 12, 1897, appellant commenced this suit to recover as damages the sum of \$5,000.00 and over. The action is based upon certain alleged false and fraudulent representations made by appellee in regard to the value of certain bank stock of the First National Bank of Cambridge City, Indiana, purchased by him from appellant in October, 1890, who was at the time of the sale the owner of eighty shares of the capital stock of that bank of \$100.00 each. An answer in two paragraphs was filed, the first being a denial, and the second averred that the cause of action did not accrue within six years before the commencement of the action. Appellant replied to the second paragraph, admitting the allegation of the answer, but averring facts by which he

Jackson v. Jackson.

sought to show that appellee had concealed the cause of action upon which the complaint was based, and thereby suspended the operation of the statute of limitation. A demurrer was sustained to this reply, and appellant refusing to plead further, judgment was rendered that he take nothing and the appellee recover cost. The ruling of the court upon this demurrer is the only error assigned. The reply, in part, is a repetition of the complaint, and the principal facts stated therein are substantially as follows: That at the time plaintiff sold the bank stock to the defendant he was preparing to leave the State of Indiana for permanent residence in some other state; that defendant was then, and had been for many years prior thereto, a stockholder and cashier of the bank, and had full knowledge of all facts sought by plaintiff tending to give the value of the bank stock, and a full knowledge of its worth at the time; and plaintiff told the defendant that he had no information as to such facts, but came to him for such knowledge. That at once, and repeatedly thereafter, during the negotiations for the sale and purchase of the stock, defendant said he would give all the information desired by the plaintiff, and did then, and repeatedly during the same negotiations, state to the plaintiff that the bank's surplus fund of \$50,000.00 had been greatly impaired by bad loans, and the amount of the bad debts had reduced the value of the stock to a sum less than its apparent face value, as shown by the reports of the bank. Defendant said plaintiff's stock was not worth \$10,000.00, but he agreed to give latter amount for it, and purchased it for that price. And during the said negotiations defendant repeatedly requested plaintiff to say nothing to any one about his stock being for sale, but to keep the matter entirely between themselves, and he, defendant, would pay the full worth of the stock,

Jackson v. Jackson.

and as much or more than anyone else would give; and defendant induced plaintiff to believe that to make public the fact of his stock being for sale would be injurious to the bank. At the time of the transfer of the stock a question arose as to who should have the undivided profits, but defendant finally said in a subdued tone, "We will split the difference if you will accept the amount, and say nothing to anyone; but just keep the whole affair to ourselves." That such statements were made with a cunning and corrupt design to deceive and mislead plaintiff, and to make him rest secure and satisfied, believing he would receive the full value of his stock, and to prevent him from making inquiries from others, then or afterwards, as to the value of his stock, and about the honesty and fair dealing of the defendant with plaintiff in connection with the purchase of said stock; and that defendant's representations in regard to the value of the stock, and in reference to bad paper in the bank, and the depreciation in value of the stock were false and fraudulent, as defendant well knew. That in deference to the wishes of the defendant, and in compliance with his repeated requests, plaintiff made no inquiry of anyone in regard to the value of the stock, nor as to the truth of the statements made concerning the kind and value of the paper in the bank, but stated to the defendant that he would accept his statements, and did so accept them; and, relying upon and believing them to be true, and resting securely in the belief that he would receive the full value of his stock, and that all the statements made by the defendant during the negotiations were true, he left the State and went to Ohio, and subsequently to California, and remained out of the State until August, 1895, and has not been in Wayne county since leaving the State. He did not

Jackson v. Jackson.

learn the facts concerning the value of his stock, nor the extent and purpose of the false representations made by defendant, until recently, the first information he had being a mere rumor, which reached him in California in 1893, that the stock so sold, at the time of the sale was worth \$12,000.00, and he subsequently learned that the true value of the stock was \$14,000.00. Upon hearing the above rumor he wrote to the defendant for information as to the truth of such rumor and as to the worth of such stock, and the defendant, with the fraudulent design of further deceiving the plaintiff, and to conceal further his fraudulent transaction with plaintiff, wholly failed, neglected, and refused to answer plaintiff's letter; and then continually thereafter concealed all facts about the value of the stock, and about his fraudulent dealing with plaintiff, and all facts that might lead to their discovery, by neglecting to and refusing to answer the plaintiff's letter, and later letters, written to him by appellant.

It is claimed by counsel for appellant that these facts set up in the reply are sufficient to show that appellee so concealed the cause of action as to check the running of the statute until after the discovery of the action, within the meaning of section 301, Burns' R. S. 1894 (300, R. S. 1881), which provides, "If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action." The statute of limitation is recognized as one of repose, and it has been frequently held by this court, in placing an interpretation upon the above section, that in order to bring a case within the concealment intended by its provisions, there must be something more alleged and proved than the mere silence or general declarations upon the part of the person said to

Jackson v. Jackson.

have concealed the cause of action. There must have been some trick or artifice to prevent a discovery, or some material fact misstated to or concealed from the party by the means of some positive or affirmative act or declaration when inquiry was being made or information sought, and under such facts the operation of the statute is suspended, and does not begin to run until after the discovery of the cause of action, or, as the authorities assert, from the time the discovery by the exercise of ordinary diligence might have been made. A failure to discover the cause of action does not, like its concealment, suspend the running of the statute. The concealment within the meaning of the statute cited, arises out of fraud, and there can be no concealment without fraud; and while the fraud in a particular case may be sufficient to give to the complaining party a right of action, still it may not, in the same case, be also sufficient to serve to conceal the cause of action within the contemplation of the law. In support of these several propositions see *Jackson v. Buchanan*, 59 Ind. 390; *Wynne v. Cornelison*, 52 Ind. 312; *Ware v. State*, 74 Ind. 181; *Stone v. Brown*, 116 Ind. 78; *Miller v. Powers*, 119 Ind. 79; *Smith v. Blair*, 133 Ind. 367; *Kennedy v. Warnica*, 136 Ind. 161; *Lemster v. Warner*, 137 Ind. 79; *State v. Osborn*, 143 Ind. 671; *Wood v. Carpenter*, 101 U. S. 135; *Campbell v. Vining*, 23 Ill. 473, 13 Am. and Eng. Ency of Law, pp. 729, 730.

Considered in the light of these authorities, the inquiry arises, does the reply respond to the required test? The pleading leaves us to indulge, in part, in speculation or inference, and in this respect violates the rule which requires that a party relying upon fraud must plead all the facts constituting the same, for, as presumptions are in favor of fair dealing, nothing is to be taken by intendment or inference. Stripped

Jackson v. Jackson.

of the alleged false representations and statements made by appellee during the negotiations leading up to the sale of the stock, and nothing is shown to have been done by appellee but to exercise silence. It is averred that the first information came to appellant in 1893 as a "mere rumor," and thereupon he wrote a letter to appellee for information as to the truth of the rumor and as to the value of the stock, and that appellee failed and refused to answer this letter, and that by refusing to answer it, and also later letters written to him seeking the same information, he thereby concealed all facts about the value of the stock. The pleading does not even apprise us whether appellee received any of these letters, or in any manner knew that appellant was seeking information in regard to the value of the stock, or anything as to the truth of the statements made by the former. The failure to answer the letters upon appellee's part, or to give the information requested, were but acts of silence, and are not available to constitute a concealment of the action; and the allegation that these acts resulted in such concealment is but a bald assertion or a mere conclusion. Appellant claims that the representations as to the value of the stock, and the requests to observe secrecy as to the transaction, made during the negotiations for the sale of the stock, were sufficient to prevent him from making a discovery that a cause of action existed in his favor growing out of the wrongs alleged in his complaint. Appellee, however, contends that these will not suffice, and especially insists that a cause of action cannot be concealed before it exists, and cites us to *Stanley v. Stanton*, 36 Ind. 445, where it is said to be "a contradiction in terms to talk of concealing a cause of action before the same has any existence." In *Boyd v. Boyd*, 27 Ind. 429, this court, in speaking of an arrangement or con-

Jackson v. Jackson.

trivance concocted to prevent a discovery of the action, said: "But it does not occur to us that it needs to be concocted after the accruing of the cause of action, provided it operates afterwards as a means of concealment, and was so intended." In *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545, on page 557, it is said: "The concealment need not be subsequent to the accruing of the cause of action concealed, but may be coincident with it." The case of *Boyd v. Boyd*, *supra*, was referred to in *Stanley v. Stanton*, *supra*, and the facts in the two cases were distinguished. The only ones relied on in the reply in the latter case were those which were necessary to give the plaintiff his right of action, and the holding was to the effect that these, as therein alleged, were not sufficient to operate in preventing a discovery.

Under the facts, there is no real conflict in the holding in these cases. The rule which seems to come fully within the authorities, and harmonizes with the holding in *Boyd v. Boyd*, *supra*, and the *Dorsey Machine Co. v. McCaffrey*, *supra*, is that it is not essential that the acts constituting the fraudulent concealment should be subsequent to the accruing of the cause of action. They may be concurrent or coincident with it, or even precede it, provided they are of such a nature or character as to operate after the time when the cause of action arose, and thereby prevent its discovery, and was so designed and intended by the concealer. See *Way v. Cutting*, 20 N. H. 187; *Bailey v. Glover*, 21 Wall. (U. S.) 342; *Bartalott v. International Bank*, 14 Ill. App. 158; *Quimby v. Blackey*, 63 N. H. 77; Greenl. on Ev., section 448; *Wood v. Carpenter*, *supra*; *Campbell v. Vining*, *supra*. While the reply cannot be considered faulty for the reason that the acts of the appellee upon which the fraudulent concealment is sought to be based are laid during the negotiations,

Jackson v. Jackson.

and prior to the consummation of the sale, still it is otherwise insufficient. The gist of the facts pleaded seems to be that the acts of appellee as therein averred resulted in concealing the true value of the stock, or that the same was not worth more than \$10,000.00, the price for which it was sold. It is questionable, however, whether it is shown from the reply by any express averment that the stock was worth at the time of the sale a sum in excess of \$10,000.

The only statements in regard to this fact are the following: "That plaintiff's first information on the subject was a mere rumor, which reached him at his home in California, in 1893, that the stock so sold by him was worth at least \$12,000.00 at the time he sold it; that he subsequently learned that the true value of said stock at the time of sale was \$14,000.00." We are left to conjecture, to some extent, as to whether the pleader intended to aver that the stock was of the value of \$12,000.00 when sold, or whether the information or "rumor" which reached appellant in 1893 was to the effect that it was of that value. In the absence of a direct showing that the stock's value exceeded the price for which it was sold, we would be compelled to presume that the selling price was its full value. But, reversing the rule, and giving the pleader the benefit of the doubt on this point by accepting the uncertain statement as a direct allegation that the stock, when sold, was worth \$12,000.00, still the pleading is deficient in other respects. It does not disclose that appellant relied upon the alleged false representations of the appellee, believing them to be true, and was thereby prevented from making any inquiry or investigation relative to their truth or falsity. It is true that it is alleged that the plaintiff, "relying upon them and believing them to be true, and resting securely in the belief that he would re-

Jackson v. Jackson.

ceive the full value of his stock, and that all the statements made were true, left the State, and went to Ohio, etc., and remained away until August, 1895." We cannot presume that leaving the State, and not returning until August 1895, which was far within the period of limitation, alone prevented appellant from discovering that he had been wronged by appellee in the manner claimed in the sale of his stock. It is stated in the reply that during the negotiations appellee told appellant to keep the matter that his bank stock was for sale entirely between themselves, yet there is no showing that these requests were complied with by appellant, and, for anything that expressly appears from the reply, he may have proclaimed the fact of the sale from the "house tops." It would seem also that the fact that appellee at the time of the sale repeatedly urged appellant to maintain secrecy in regard to the transaction, without giving any reasonable explanation for such requests, would have tended to arouse the suspicions of an ordinarily prudent man, and have invited an inquiry or investigation in some manner in regard to the fairness of the transaction. See *Jackson v. Buchanan*, *supra*.

Neither can it be said that there is sufficient diligence shown to have been exercised by appellant to discover, within the period of limitation, the cause of action upon which his suit is founded.

Other infirmities in the reply might be pointed out, but those mentioned will suffice to condemn it. The court therefore did not err in adjudging it insufficient.

Judgment affirmed.

 Abshire et al. v. Williamson.

ABSHIRE ET AL. v. WILLIAMSON.

[No. 18,055. Filed January 6, 1898.]

APPEAL AND ERROR.—Jurisdiction of Parties.—The Supreme Court will not proceed to adjudicate an action until jurisdiction has been acquired over all the parties whose rights or interests will be necessarily affected by its judgment. *p. 252.*

SAME.—Parties.—Dismissal of Action.—The Supreme Court will dismiss a cause on its own motion where the parties necessary to a complete determination of the action are not brought into court. *p. 252.*

SAME.—Parties.—Same Rule Applies to Coparties as to Adverse Parties.—The consequences which follow the omission of an appellant to comply with the law relative to bringing coparties before this court are the same upon his failure to observe the rule in regard to adverse parties. *p. 253.*

From the Wells Circuit Court. *Appeal dismissed.*

Wilson & Todd, for appellants.

Dailey, Simmons & Dailey, for appellee.

JORDAN, J.—The appellee herein commenced this action in the lower court, making Samuel and Florence B. McCluney, Henry D. Mumert, Peter Nutter, C. Bert Abshire, Christian Blody, and William H. Ernst, auditor of Wells county, Indiana, defendants thereto. The purpose of the suit was to recover a personal judgment of some of the defendants, and obtain a decree foreclosing a mortgage, and declaring the lien thereof to be senior to certain other mortgages held by some of the defendants. The defendant Ernst, as county auditor, appeared and filed an answer and cross-complaint. He made the plaintiff, Williamson, and all of his codefendants, defendants to the cross-complaint. By this cross-action it was sought to foreclose a certain school fund mortgage against all who were made defendants to the cross-action, and to determine and adjust certain liens which they claimed to hold and have against the mortgaged premises, the latter being

149	248
150	708
151	346
151	539

149	248
154	304
154	442
155	232

149	248
158	209
158	502

149	248
160	447

149	248
162	143
163	144

149	248
163	400

149	248
167	70
167	552

149	248
169	208

149	248
171	461

the same land as that embraced in the mortgage of the plaintiff. The defendant Abshire appeared and answered the plaintiff's complaint, and also filed a cross-complaint, making the plaintiff and all of his codefendants defendants thereto. By his cross-complaint Abshire sought to recover a personal judgment, and a decree foreclosing certain mortgages on the same lands. The defendant Blody answered the cross-complaint of Abshire by the general denial and plea of payment, etc. Ernst, the auditor, demurred to the cross-complaint of Abshire, which demurrer was overruled, and he then filed his answer thereto. Abshire demurred to the second, third, fourth, and fifth paragraphs of Blody's answer to his cross-complaint, which demurrer was overruled, and he excepted, and then replied to the answer of Blody. Abshire also unsuccessfully demurred to the cross-complaint of Ernst, as auditor, and thereupon filed his answer to said cross-complaint. Ernst, as auditor, filed an answer to the cross-complaint of Abshire. Samuel and Florence B. McCluney, Henry D. Mumert, and Peter Nutter seem to have been defaulted. The issues being joined between the plaintiff and Abshire on the complaint of the former and the cross-complaint of the latter, and also between Abshire, Blody, and Ernst, as auditor, on the respective cross-complaints and answers, the cause was submitted to the court for trial, and the court made a special finding, and stated its conclusions of law, and rendered the judgment and decree which appellant seeks to reverse. The judgment was in favor of the plaintiff, Williamson, on the notes and mortgage mentioned in his complaint, and against the defendants, McCluney and McCluney, Mumert, Abshire, and Blody, and in favor of the State of Indiana, on the school fund mortgage, set up in the cross-complaint of Ernst, auditor, as against Abshire and Blody for

Abshire et al. v. Williamson.

\$309.75, and against all of the parties on a foreclosure of said mortgage. It was further adjudged and decreed by the court that as between Abshire and Blody the mortgaged premises should not be subjected to the lien of the plaintiff, Williamson, and as between Abshire and Blody, the former should pay off and discharge each and all of the liens on the land in question existing in favor of the plaintiff and in favor of the State on the school-fund mortgage, and that the property, real and personal, of Abshire, should be first exhausted in the payment thereof; and it was further adjudged that Abshire take nothing on the three notes signed by Samuel and Florence B. McCluney, being the notes set up by him in his cross-complaint; and it was adjudged that his codefendants, together with the plaintiff, recover of him their cost laid out and expended. Abshire is the only party who moved for a new trial, and the only one who has appealed from the judgment and assigned error in this court, and Williamson is the only party made an appellee to this appeal.

Appellant Abshire bases his fifth, sixth, seventh, and eighth assignments of error on the action of the court in overruling his demurrer to the second, third, fourth, and fifth paragraphs of Blody's answer to the cross-complaint of said appellant. The ninth assignment is based on the court's decision in overruling appellant's demurrer to the cross-complaint of Ernst, auditor. By other allegations in his assignment of error he complains of certain other rulings of the court made against him in favor of Ernst and Blody. Appellant has made Samuel and Florence B. McCluney, Mumert, Nutter, Blody, and Ernst (auditor of the county of Wells, in the State of Indiana), co-appellants in his appeal, and has notified each of said parties to either join him or decline to join as ap-

Abshire et al. v. Williamson.

pellants therein. Blody has appeared specially and moved to dismiss the appeal, upon the ground that he ought to have been made an appellee and notice given to him as appellee, all of which appellant Abshire has failed to do. The State of Indiana, on the relation of William H. Ernst, auditor, comes by Geo. W. Studabaker, successor in office, and declines to join in the appeal, and asks that the judgment of the court be affirmed. Mumert also declines to join in the appeal, and moves that it be dismissed.

It is insisted by counsel for Blody that under the issues upon the pleadings in the case, and according to the judgment rendered, the former was an adverse party to Abshire in the lower court, and under the assignment of error is an adversary of Abshire in this court, and consequently he ought to have been made an appellee, and served with notice as such. It is evident that under the issues in this action as joined between Blody and Abshire, and between the latter and the State of Indiana on the relation of Ernst, auditor, on the several cross-complaints and answers, that each of these parties were adverse to Abshire, in the lower court, upon these issues, and that the interests of both Blody and the State were rendered hostile to Abshire by the judgment and decree of the court. It is also manifestly true that under the assignment of errors both continued to be adversaries of the appellant Abshire in this court. As against Abshire, the State of Indiana (which seems to have prevailed, and recovered a judgment against all the parties below), and Blody as well, are benefitted by the judgment of which Abshire complains, and are each interested, at least as against the latter, in maintaining the judgment as rendered; while on the other side, Abshire is interested, not only as against Williamson, the sole appellee herein, but also as against Blody and the

Abshire et al. v. Williamson.

State, in securing a reversal of the judgment. It is clear, then, under these conditions, in order that there may be a proper and complete adjudication of the questions involved, that neither Blody nor the State should be made to occupy the position of co-appellants, but must be joined as appellees; and, as the appeal is one taken in vacation, they should be served with notice as such appellees, and the appeal perfected within the time allowed by the statute. With this rule of appellate procedure, it appears that the appellant has not complied, and the question raised by such failure relates to our jurisdiction; for it is a fundamental rule in jurisprudence that before any court will proceed to adjudicate upon the subject matter, it must first acquire jurisdiction over all the parties whose rights or interests will be necessarily affected by its judgment. Not having the power, under the facts, to decide this cause as an entirety, unless all of the necessary parties are brought into court as required by law, therefore we will not violate the well settled rule which forbids the decision of a cause in fragments, by asserting authority to make a partial decision in this case, which must be regarded as an entire and indivisible cause, but may, and properly should, dismiss the appeal on our own motion. See Elliott's App. Proced., sections 139, 140, 144, 154, 155, 157, 161, 162; *Vordermark v. Wilkinson*, 142 Ind. 142; *Holloran v. Midland R. W. Co.*, 129 Ind. 274; *Hutts v. Martin*, 131 Ind. 1; *Lee v. Mazingo*, 143 Ind. 667; *Lilly v. Somerville*, 142 Ind. 298.

Appellant in this case has taken no steps, nor made any efforts, within the time fixed by the statute for taking appeals, to bring all the necessary parties properly before this court, and such failure, as a general rule, will operate to dismiss an appeal. *Holloran v. Midland R. W. Co.*, *supra*; Elliott's App. Proced., section 162.

The State, *ex rel.* Ballard *et al.*, v. Wilson, Trustee.

The consequences which follow the omission of an appellant to comply with the law relative to bringing coparties before the court must be the same upon his failure to observe the rule in regard to adverse parties.

For the reasons given the appeal is hereby dismissed at the cost of appellant Abshire.

STATE, EX REL. BALLARD ET AL., v. WILSON, TRUSTEE
OF JACKSON SCHOOL TOWNSHIP.

[No. 18,294. Filed January 6, 1898.]

TOWNSHIP TRUSTEE.—*Power of to Redistrict Township for School Purposes.—Statute Construed.*—The act of February 7, 1898 (Acts 1898, p. 17), providing for the relocation of schoolhouses, in no way changes the power of the township trustee to redistrict his township for school purposes, and abolish school districts, when no new schoolhouses are built, or the sites of those already existing in districts not abolished, are not changed.

From the Cass Circuit Court. *Affirmed.*

Magee & Funk, for appellant.

Geo. W. Walters and *Lairy & Mahoney*, for appellee.

MONKS, J.—This action was brought by the relator to compel appellee, by writ of mandamus, to employ a teacher for, and to maintain school No. 10, in the township of which he was trustee. Appellee filed his return to the alternative writ, to which appellants filed a demurrer for want of facts, which was overruled. At request of appellants, the court made a special finding of the facts and stated conclusions of law thereon, to each of which appellants excepted, and judgment was rendered in favor of appellee.

It appears from the special finding that for twenty years before the commencement of this action the schoolhouse known as "No. 10," had been one of the regularly established schoolhouses of said town-

149	253
150	312
149	253
150	530
149	253
150	247
149	253
150	373

The State, *ex rel.* Ballard *et al.*, v. Wilson, Trustee.

ship, and school had been regularly maintained there the same as at the other schoolhouses of said township; that the schoolhouse was old and out of repair; that in 1896, before the commencement of the school in the fall, of the year, appellee as school trustee of said township, redistricted said township for school purposes, and thereby abandoned schoolhouse No. 10, and notified the patrons of that schoolhouse that they might have the privilege of sending to any school in the township which might be the most convenient. It does not appear that any new schoolhouses were erected under the new arrangement, or that the site of any schoolhouse was changed from one place to another in this same district.. Appellee afterwards employed teachers for all the schools of said township as redistricted, but did not employ any teacher for No. 10 which had been abandoned.

Under the provisions of section 5920, Burns' R. S. 1894 (4444, R. S. 1881), it has been held by this court that the township trustee has the power to redistrict his township for school purposes, and abolish a school district, when, in his judgment, public interests require it, subject to the right of appeal to the county superintendent. *State, ex rel., v. Sherman*, 90 Ind. 123; *Tufts v. State, ex rel.*, 119 Ind. 232.

Appellant, however, insists that, since the taking effect of the act approved February 7th, 1893, Acts 1893, p. 17, sections 5920a-5920c, Burns' R. S. 1894, (4444a-4444c, Horner's R. S. 1897) the rule is changed. It is clear from an examination of the provisions of the act cited, that it only applies when it is proposed to change the site of a schoolhouse from one point to another in the same school district. In such case the change of site can only be made by petition to the county superintendent, as provided in said act. *Kessler v. State, ex rel.*, 146 Ind. 221. Said act in no way

The City of Huntington v. Cast et al.

changes the power of the township trustee, as it existed before the passage of said act, to redistrict his township for school purposes, and abolish school districts, when no new schoolhouses are built, or the sites of those already existing in districts not abolished are not changed.

If it should appear, however, that the redistricting for school purposes or the abolishment of a school district was for the purpose of evading the provision of the act of 1893, in regard to changing sites of schoolhouses, the same would be invalid and of no effect. Maxwell on Construction of Statutes, pp. 133, 134; *State v. Forsythe*, 147 Ind. 466.

It does not appear that the redistricting in this case or the abolishment of district No. 10 was for such purpose. Judgment affirmed.

THE CITY OF HUNTINGTON v. CAST ET AL.

[No. 18,333. Filed January 6, 1898.]

JUDICIAL NOTICE.—*Census*.—Courts will take judicial notice of a census or other enumeration made under the authority of the State or of the United States. p. 258.

MUNICIPAL CORPORATIONS.—*Metropolitan Police Commissioners*.—*Appointment*.—*Census*.—Under section 1 of the act of February 28, 1897, providing for the establishment of a board of metropolitan police commissioners within and for cities of 10,000 inhabitants, according to the United States census of 1890, or according to a census taken under the authority of the mayor of such city, a census taken by the mayor must be an official enrollment of the people of the city, and must be a public document preserved in the archives of the city subject to the inspection of all those interested. pp. 256-259.

SAME.—*When Possession of Property Protected by Injunction*.—Where it is sought to take possession of the police property of a city, without authority of law, those in possession may protect their rights and the rights of the city by the remedy of injunction. p. 259.

SAME.—*Appointment of Metropolitan Police Commissioners*.—*Validity*.—Under section 1 of the act of February 28, 1897, providing for the appointment by the Governor of a board of metropolitan police

149	255
150	204

149	255
150	219

The City of Huntington v. Cast et al.

commissioners within and for cities of 10,000 inhabitants according to the United States census of 1890, or according to a census taken under the authority of the mayor, the Governor's right to appoint is determined by the statement as to population certified to him by the mayor; but if the mayor's certificate is not based upon a census, such as is contemplated by the statute, the appointments have no validity. p. 260.

From the Huntington Circuit Court. *Reversed.*

O. W. Whitelock, S. E. Cook, J. Fred France and Z. T. Dungan, for appellant.

J. B. Kenner and U. S. Lesh, for appellees.

HOWARD, C. J.—By section one of an act of the General Assembly, in force February 28, 1897 (Acts 1897, p. 90), section 3106g, Horner's R. S. 1897, it is provided that: "In all cities of this State of ten thousand inhabitants, according to the United States census of 1890, or according to a census taken under the authority of the mayor of said city, and not exceeding thirty-five thousand inhabitants, according to the United States census of 1890, there shall be established within and for said cities, a board of metropolitan police commissioners, to consist of three members to be appointed by the Governor."

By section five of the same act, provision is made that such board "shall have the custody and control of all public property, including station houses and city prisons, patrol wagons, books, records and equipments belonging to the police department."

In the first paragraph of the complaint in this case it is alleged that the appellant city has less than 10,000 inhabitants; that, through her common council, she has exclusive control of the streets and alleys, public buildings, and police department of said city; that the appellees Ayers, McClelland, and Cline, under a pretended and illegal appointment by the Governor as a metropolitan police board, are threatening to take

The City of Huntington v. Cast *et al.*

possession and control of said streets and alleys, public buildings, and police department, and to deprive appellant of such control; that the appellee, Cast, is mayor, and chairman of the police board of said city, and is threatening to turn over to his co-appellees all the equipments of said police force. The prayer is for a restraining order, and that upon the final hearing the appellees "be perpetually enjoined from in any way interfering or taking control, supervision, or management of the streets and alleys, public buildings, police department, or any part thereof, until they establish their right by law to said office."

In a second paragraph of complaint the following, with other, additional allegations are found: That prior to the commencement of this action, the appellee Cast, as mayor of said city, "took a pretended census thereof; that he included in said census inhabitants outside of the corporate limits of said city; that said census included names of persons who are not inhabitants thereof; but she says that she cannot at this time give the exact facts concerning said census, for the reason said mayor, though often requested, refused to report the same to the council, or allow the members to examine it, but that he caused or permitted the same to be destroyed, and has failed to file the same in the clerk's office of said city, or with the papers in his office; that by deducting the inhabitants of said territory outside of said city, and the other names as above, it will leave the inhabitants much less than 10,000."

It is assigned as error that the court sustained a demurrer to each paragraph of the complaint, and dissolved the temporary restraining order.

One contention in support of the ruling on the demurrer is, that the complaint fails to state that the

The City of Huntington v. Cast et al.

city of Huntington did not have a population of 10,000 according to the United States census of 1890. But "the court," as said in *Denney v. State*, 144 Ind. 503, 525, 31 L. R. A. 726, "will take notice of a census or other enumeration made under the authority of the State, or of the United States;" and we know that the city of Huntington did not have 10,000 inhabitants according to the census of 1890. *Stultz v. State*, 65 Ind. 492, 498; *State v. Swift*, 69 Ind. 505, 509.

If therefore the appointment of the appellees Ayers, McClelland, and Cline as metropolitan police commissioners can be sustained under the statute cited, it must be by reason of the census said to have been taken by the mayor. But it is admitted, by the demurrer to the second paragraph of the complaint that the mayor never made such census public; that he refused to allow the members of the common council to examine it; that he failed to file it in the city clerk's office, or with the papers in his office; and that he caused or permitted it to be destroyed. The question then arises whether the enumeration so made, and the evidences of which are nowhere to be found, can be called a "census" as provided for in the statute in question.

The statute mentions the census to be taken by the mayor in connection with the census taken by the United States. Even if it were not mentioned in such connection, we should know that the census provided for in the statute, to be taken by the mayor of the city, must be an official enumeration of the people, and as such a public record. The standard definitions are to this effect. Webster says that a census is "An official registration of the number of the people." The Century Dictionary: "An official enumeration of the inhabitants of a state or country, with details of sex and age," etc. The Standard Dictionary: "An official

The City of Huntington v. Cast et al.

numbering of the people of a country or district." Burrill, Law Dict.: "In the Roman law. A numbering or enrollment of the people, with a valuation of their fortunes." Black, Law Dict.: "The official counting or enumeration of the people of a state or nation, with statistics," etc. Bouvier, Law Dict.: "An official reckoning or enumeration of the inhabitants and wealth of a country."

The census to be taken by the mayor, in contemplation of the statute before us, was, therefore, in the first place, to be an official enrollment of the people of the city of Huntington. Such an enrollment or registration of the people was also to be a public document, to be preserved in the archives of the city, where it might be subject to the inspection of all those interested. A census is not merely a sum total, but an official list, containing the names of all the inhabitants. It is confessed that there was here no such census, and it must therefore follow, as we think, that there was no authority, under the statute, for the report made by the mayor to the Governor of the number of the inhabitants of the appellant city.

It is also argued that the action brought by appellant was not the proper one; that this was a controversy as to the right to hold an office, and hence that *quo warranto*, and not injunction, was the proper remedy. If, however, appellees were proceeding, without authority of law, to take possession of the police property of the city, certainly those in possession might protect themselves from such invasion of their rights and the rights of the city by enjoining those who sought to wrest from them such possession until authority to do so were first shown. *Erwin v. Fulk*, 94 Ind. 235; *City of Delphi v. Startzman*, 104 Ind. 343; *Central Union Tel. Co. v. State*, 110 Ind. 203.

The welfare and good order of society and govern-

Peterson v. New Pittsburg Coal and Coke Co.

ment require that those engaged in the discharge of public duties should not be disturbed by claimants whose right to discharge such functions is as yet uncertain. Equity will protect the possession of the incumbents from any unlawful intrusion. The public welfare requires that such protection should not be left to the totally inadequate remedy of an action for trespass. See also *Palmer v. Foley*, 36 N. Y. Super. Ct. 14.

We do not think there is in the case any question as to the right of the Governor to appoint. The Governor's power is derived from the statute, and if that gave no right to the creation of a board of metropolitan police commissioners for the city of Huntington, as we hold it did not, under the facts stated in the complaint, then there could be no such office. The Governor acted, and rightfully so, under the statement as to population certified to him by the mayor; but the mayor's certificate not being based upon any census such as contemplated by the statute, was itself without any force, and the appointments made upon such information can have no validity under the law. *Board, etc., v. State*, 61 Ind. 379; *State v. Harrison*, 113 Ind. 434, 438.

The judgment is reversed, with instructions to overrule the demurrer to each paragraph of the complaint, and for further proceedings.

PETERSON v. NEW PITTSBURG COAL AND COKE COMPANY.

[No. 18,162. Filed January 7, 1898.]

NEGLIGENCE.—Personal Injuries Resulting from Incompetent Fellow Servants.—Complaint.—In an action for damages for personal injuries caused by the incompetence of fellow servants a complaint is fatally defective which does not contain an averment that the plaintiff was ignorant of the delinquencies of such servants. p. 262.

Peterson v. New Pittsburg Coal and Coke Co.

MASTER AND SERVANT.—*Negligence in Furnishing Place to Work.*

—*Complaint.*—In an action by an employe for damages for the failure of his employer to furnish a safe place to work, the complaint must aver the practicability of additional appliances for the safety of employes, and that plaintiff at the time of the injury was ignorant of the dangers to which he was exposed. *p. 263.*

SAME.—*Presumption as to Competency of Servant.*—When a person of mature years takes employment in a service, whatever the ordinary hazards, he must be presumed in the absence of allegations to the contrary, to possess knowledge and skill fitting him for the service. *p. 263.*

From the Sullivan Circuit Court. *Affirmed.*

George G. Reily, for appellant.

John S. Bays, for appellee.

HACKNEY, J.—This is the third appeal of this case, see *New Pittsburg, etc., Coke Co. v. Peterson*, 136 Ind. 398; *New Pittsburg, etc., Coke Co. v. Peterson*, 14 Ind. App. 634. The lower court sustained the appellee's demurrer to each of the two paragraphs of amended complaint, and that ruling is here assigned as error. The sufficiency of the first paragraph only has been discussed by appellant's counsel, and will alone be considered. The facts alleged disclose that the appellant, an employe of the appellee, was engaged in cutting ice from the sprocket wheels of a coke elevator, that in doing so his feet rested partly upon one of the elevator buckets, and that while so engaged the machinery propelling the elevator was started, and he was thereby thrown upon the buckets and against other parts of the elevator and seriously injured.

The company conducted its business of mining, farming, merchandising, and operating coke ovens, through a general superintendent, who selected a foreman, with power to employ, direct, and discharge servants, for each of the departments of said business.

At the time of appellant's injury he was acting pursuant to directions from the foreman of the coke department, who was assisting in the work of removing

Peterson v. New Pittsburg Coal and Coke Co.

the ice from the elevator. In the two former appeals it was held that the foreman was a fellow servant, and not a vice principal. Nothing is alleged in the complaint as again presented to us, which would give any other character to the service of the foreman at the time. An effort was made, however, to take the case out of the fellow servant rule, by allegations that the superintendent and foreman were each unfit for the service in which they were engaged, by reason of their ignorance, respectively, of the duties of the positions in which the company employed them. Several delinquencies in duty were alleged against the foreman and the superintendent, such as the failure of the latter to be present at times, his omission to give particular instructions, by rule or otherwise, as to the time of starting the machinery, and the failure to instruct the appellant as to the dangers of appellee's machinery, and the failure of the former to see that the belt connecting the power with the elevator was thrown off during the work, or to see that the power was not applied, and in placing appellant in a place of danger.

The pleading is meager and doubtful, if not deficient, in allegations disclosing that any of such alleged delinquencies were the proximate cause of the injury; but a fatal deficiency in the pleading was a failure to allege, directly or indirectly, that the appellant was ignorant of the delinquencies of said servants, or that he did not know that they were unfit for the service in which they were employed. That such allegation was indispensable, as showing that the risk had not been assumed, has been often decided. *Evansville, etc., R. Co. v. Duel*, 134 Ind. 156, and cases there cited. See also *Pennsylvania Co. v. Congdon*, 134 Ind. 226; *Ames v. Lake Shore, etc., R. W. Co.*, 135 Ind. 363; *Ohio, etc., R. W. Co. v. Dunn*, 138 Ind. 18; *Evansville, etc.,*

Peterson v. New Pittsburgh Coal and Coke Co.

R. R. Co. v. Tohill, Admx., 143 Ind. 49; *Salem-Bedford Stone Co. v. Hobbs*, 144 Ind. 146.

It was alleged, also, that the place where the appellant was required to work was unsafe, in that a second or additional platform was not constructed about the elevator at the upper sprocket, upon which to stand while engaged in the work then in hand. It was not alleged that it was practicable to maintain an additional platform, nor that the platform occupied by the foreman while assisting in the work was not sufficient for all purposes, in connection with the elevator. Judging the sufficiency of the pleading, we may not supply by inferences or presumptions, the necessity or practicability of an appliance merely from an allegation of its absence.

The complaint, as to the question of an unsafe place to work, is defective for the additional reason that it is not alleged that the appellant was not aware of the defect and its dangers. See authorities above cited.

As to the alleged failure to instruct the appellant concerning the dangers of appellee's machinery, it was not made to appear that the appellee or the superintendent or the foreman knew, or had reason to believe, that the appellant was ignorant of or incapable of comprehending, the dangers connected with the use of the appellee's machinery, or that, from his age any duty to advise him could be implied. The ordinary rule is that when a person of mature years takes employment in a service, whatever the ordinary hazards, he must be presumed in the absence of allegations to the contrary, to possess knowledge and skill fitting him for the service.

It was not alleged that the appellee knew of latent dangers in the machinery, its use, or in the place to work, that appellant was ignorant of such dangers, and that the appellee failed to notify him. For any-

Garrett v. The State, *ex rel.* Huntsinger.

thing appearing in the complaint the allegation does not have reference to extraordinary hazards.

In our opinion, the complaint was bad, and the lower court did not err in sustaining the demurrer thereto. The judgment is affirmed.

GARRETT v. THE STATE, EX REL. HUNTSINGER.

[No. 18,298. Filed January 11, 1898.]

NEW TRIAL.—*Venire de Novo.*—A motion for a *venire de novo* will not be sustained unless the verdict is so defective and uncertain that no judgment can be rendered thereon. *pp.* 264, 265.

VERDICT.—*Sufficiency.*—A verdict, however informal, is good if the court can understand it. *p.* 265.

APPEAL AND ERROR.—*Bill of Exceptions.*—*Longhand Manuscript of Evidence.*—The evidence is not properly in the record where it is not embodied in or made part of the bill of exceptions. *p.* 265.

SAME.—*Longhand Manuscript of Evidence.*—*How Made Part of Record.*—In order to make the longhand manuscript of the evidence a part of the record on appeal, prior to the taking effect of the act of 1897 (Acts 1897, p. 244), it was necessary that it be filed in the clerk's office before being incorporated in the bill of exceptions and signed by the judge. *p.* 265.

From the Madison Circuit Court. *Affirmed.*

C. L. Henry, E. B. McMahon and J. A. Van Osdol,
for appellant.

John W. Lovett and Henry C. Ryan, for appellee.

MONKS, J.—Appellee brought this action against appellant, to compel him to perform an alleged duty as road supervisor. The cause was tried by a jury, and the following verdict returned: "We the jury find for the plaintiff." Over a motion for a *venire de novo*, and a motion for a new trial, the court rendered judgment on the verdict in favor of appellee, and awarded a peremptory writ of mandate against appellant. The errors assigned call in question the action of the court in overruling said motions.

It is settled law that a motion for a *venire de novo* will not be sustained unless the verdict is so defective

149	264
149	560
162	701

Garrett v. The State, *ex rel.* Huntsinger.

and uncertain that no judgment can be rendered thereon, and that a verdict, however informal, is good if the court can understand it. *Central Union Tel. Co. v. Fehring*, 146 Ind. 189, and cases cited. As the verdict in this case was general in favor of appellee, it found all the facts and issues in favor of appellee. Even if the jury should have assessed damages against appellant, that was an error of which only the appellee could complain. *Central Union Tel. Co. v. Fehring, supra*. It follows that the court did not err in overruling the motion for a *venire de novo*.

The questions presented by the motion for a new trial depend for their determination upon the evidence, which appellee insists we cannot consider, because the evidence is not in the record. What purports to be a bill of exceptions follows what the clerk certifies is the original longhand manuscript of the evidence made by the official reporter; but it does not refer to the longhand manuscript, nor is the same embodied in or made a part of such bill of exceptions. Under the rule declared in *City of Alexandria v. Cutler*, 139 Ind. 568, the evidence is not in the record. Besides, even if the longhand manuscript was incorporated in the bill of exceptions, the same is not a part of the record, for the reason that it is not shown that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions and signed by the judge. *Citizens Street R. Co. v. Sutton*, 148 Ind. 169, and cases cited; *Hoover v. Weesner*, 147 Ind. 510, and cases cited. This case was filed July 15, 1896, and is not therefore governed by the provisions of the act approved March 8, 1897 (Acts 1897, p. 244), concerning the manner in which the evidence may be made a part of the record upon appeal.

No available error appearing in the record, the judgment is affirmed.

The State, *ex rel.* Morris, *v.* McFarland.

149	266
170	146

THE STATE, EX REL. MORRIS, *v.* MCFARLAND.

[No. 18,419. Filed January 11, 1896.]

OFFICERS.—*County Superintendent.*—*Appointment.*—*Power of County Auditor to Give the Casting Vote.*—*Statute Construed.*—Under section 5900, Burns' R. S. 1894 (4424, R. S. 1881), providing for the appointment of county superintendent, the county auditor is authorized to give the casting vote in case of a tie, whether such appointment is made by ballot, *viva voce* vote, or by the adoption of a motion or resolution declaring that the person therein named be appointed to fill the office. *State v. Edwards*, 114 Ind. 581, overruled.

From the Martin Circuit Court. *Affirmed.*

H. Q. Houghton, J. B. Marshall and H. McCormick,
for appellant.

F. Gwin, Rogers & Rogers and Ogden & Inman,
for appellee.

JORDAN, J.—This proceeding was instituted, upon information filed in the lower court in the name of the State, on the relation of the appellant, John T. Morris, whereby he sought to eject the appellee, Elijah McFarland, from the office of county superintendent of the county of Martin, and gain admission himself to that office. On the issues joined there was a trial, and special finding of facts by the court, and conclusions of law stated thereon to the effect that the appellee was legally elected and entitled to the office in dispute, and that the relator take nothing by the action, and judgment was rendered accordingly.

The only material question presented for decision is as to whether the auditor of Martin county, under the facts, was authorized by law to give the casting vote which he did in the proceedings by the township trustees relative to the appointment of a superintendent. A summary of the material facts, as dis-

The State, ex rel. Morris, v. McFarland.

closed by the finding, is as follows: There are ten township trustees of Martin county, Indiana, and all of these trustees assembled at the office of the county auditor of that county on the first Monday in June, 1897, in compliance with the statute, for the purpose of appointing a county superintendent to succeed the relator, who was then the incumbent of that office, and had held the same for four years prior to said day. The trustees organized by electing one of their number chairman (the auditor acting as clerk, as provided by the statute), and then proceeded to ballot for superintendent, taking thirty-eight ballots, and no one person receiving a majority of all the votes cast, as the result of any one of the ballots taken, the votes cast being distributed among several persons. At the close of the thirty-eighth ballot, no appointment having been made, on motion it was ordered that the meeting adjourn to convene again at 6:30 p. m. on the same day, at which hour the trustees all again convened, and proceeded to ballot until 11:50 p. m. without succeeding in securing the appointment of a superintendent, when, having taken 138 ballots in all on said day, they again adjourned to meet at 8 o'clock a. m. the next day, June 8th, 1897, at which time they assembled and proceeded with the unfinished business before them. After taking fourteen more ballots, making a total of 152, and no one, as the result of any of said ballots, having received a majority of all the votes cast, and no two persons having received an equal number of the votes cast on any of said ballots, a motion was then made and seconded that the method of voting be changed from voting by ballot to that of voting upon a motion to appoint; and on the adoption of this motion, as made, five of said trustees voted in favor of the motion and five against it, and thereupon, a tie having resulted, the auditor cast his vote in the

The State, ex rel. Morris, v. McFarland.

affirmative, and the motion was declared adopted. It was then moved and seconded that a resolution be adopted as follows: "Be it resolved by the trustees of Martin county, Indiana, that Elijah McFarland be appointed county superintendent of schools of said county for the ensuing two years." A motion was made to amend the resolution by striking out the name of McFarland and inserting that of John T. Morris. On the adoption of this motion, five of the trustees voted in favor thereof and five against, and the chairman announced a tie, and thereupon the auditor voted against the proposition to amend, and it was declared lost. A vote was then taken on the motion to adopt the resolution, which resulted in five of the trustees casting their votes in favor of the resolution and five against its adoption, and thereupon the chairman declared a tie, and the auditor then cast his vote in favor of the resolution, and the chairman declared it adopted, and that McFarland had been appointed county superintendent for the term of two years, and the meeting then, on motion, was declared to be adjourned. Other facts are found showing that McFarland, the appointee, and appellee herein, was eligible to be appointed to the office in controversy, and that he duly qualified under said appointment and entered upon the discharge of the duties of the office.

Section 5900, Burns' R. S. 1894 (4424, R. S. 1881), being the statute upon which the appointment of appellee to the office in question is based, omitting parts not essential to the question involved, reads as follows: "The township trustees of the several townships of each county shall meet at the office of the county auditor of such county on the first Monday of June, 1873, and biennially thereafter, and appoint a county superintendent. * * * Whenever a vacancy shall occur in the office of county superintendent, by

The State, *ex rel.* Morris, v. McFarland.

death, resignation or removal, the said trustees, on the notice of the county auditor, shall assemble at the office of such auditor, and fill such vacancy; * * * * and the county auditor shall be the clerk of such elections in all cases, *and give the casting vote in case of a tie*, and shall keep the record of such elections in a book to be kept for that purpose.” (Our italics.) It is claimed by counsel for the relator that, upon a proper interpretation of this statute, under the facts, that the appellee, McFarland, was not legally appointed to the office in dispute, for the reason that he did not receive a majority of the votes cast by the ten trustees present and voting at the time the appointment is said to have been made. Their specific contention is that, in view of the fact that the resolution which named the appellee as the person to be voted for received the votes of but five of the trustees, while those of the remaining five were cast against it, this action of the trustees did not operate to create a tie, within the meaning of the statute, and therefore the auditor was not authorized to vote either for or against the adoption of the resolution. It is insisted that, under the provisions of the statute, it is only where the votes of the trustees have been cast for two persons, each of whom receives an equal number of such votes, that a tie can result, which would warrant the auditor to give the casting vote. It is further urged that the auditor had no right, as he did, to vote, under the circumstances, and thereby change the mode of making a choice by ballot to that of making the appointment by means of a resolution. The law, as we have seen, lodges the authority of appointing a county superintendent in the township trustees of the county. They, when assembled for that purpose, constitute the body invested with the power to discharge this important duty. The auditor, it appears, is made the clerk of the

The State, *ex rel.* Morris, v. McFarland.

election, and it is only in the event of an equal division of the trustees (a quorum being present) that the auditor is invested with power to cast his vote for or against the particular proposition involved. The law does not, in terms, prescribe any precise method, manner, or form, by which the trustees shall choose a superintendent, and therefore the form or means by which the appointment may be made is not material. The choice of such officer by the body empowered to make the selection, may be ascertained by ballot, or a *viva voce* vote, or by the adoption of a motion or resolution declaring that the person therein named be appointed to fill the office. See *Sturges v. Spofford*, 52 Barb. 436, on page 446; *State v. Kilroy*, 86 Ind. 118; *State v. Dillon*, 125 Ind. 65.

It is conceded by counsel for the appellant that had the resolution under which appellee claims to have been appointed received a majority of the votes cast by the trustees, it would have been adopted, and he would have been thereby legally elected. It being permissible, then, for a majority of the trustees to designate their choice of a person by either the adoption of a motion or resolution to that effect, upon what tenable grounds can it be asserted that, when an equal division of the trustees, present and voting, results upon the adoption of such motion or resolution, it does not constitute a tie vote within the meaning of the statute? That it would be such under parliamentary law or usage is evident. We must confess that we can perceive no sufficient reason for upholding the right of the auditor to give the casting vote, when the tie results from a vote taken by means of a ballot, and denying his right to do so when the trustees are equally divided upon a *viva voce* vote, taken on making the appointment by means of a motion or resolution. From the number of ballots taken in the case at bar,

The State, *ex rel.* Morris, v. McFarland.

it must have been evident to all that further efforts to appoint a superintendent by means of a ballot vote would be of no avail; and, as the statute commanded that the appointment should be made, it certainly was apparent that, under the existing circumstances, the purpose and object of the law could be more easily and conveniently carried out by the adoption of a resolution naming the person to be chosen. In the case of *State v. Dillon, supra*, all of the trustees, being eight in number, met at the time and place fixed by the law, and, after an organization had been secured, the name of Dillon was presented by a motion to be voted for to fill the office of county superintendent. Four of the trustees voted in favor of the motion, and the other four refused to vote either for or against it. The county auditor, under the circumstances, cast his vote in favor of the motion. While it is true that, in the case mentioned, the vote of the auditor was not considered as a controlling factor, as it was held that Dillon had been legally elected, for the reason that he had received a majority of the votes of a quorum present and voting. The view of the court, however, expressed through Olds, J., speaking as its organ, relative to the question as now involved, was as follows: "In this case the elective body was in session, it consisted of eight members, and it was properly moved that Dillon be elected county superintendent, and four of the eight voted for his election, the other four declining to vote. *If the other four had voted against his election, the law in that case provided that the county auditor should give the casting vote.* [Our italics.] It was the duty of all the members of the board to vote for or against the candidate whose name was proposed, and they could not defeat the object of the meeting and avoid the law, and prevent an election by remaining silent and refusing to vote either for or

The State, ex rel. Morris, v. McFarland.

against the candidate proposed." The mayor of a city, in this State, by the charter law relative to the incorporation of cities, is made the presiding officer at the meetings of the common council, and in the case of a tie on the part of the members of the council he has the casting vote. It is the frequent practice where the council is empowered to appoint city officials, to designate the person appointed by the adoption of a resolution, and in the case of an equal division of the council on a vote taken on such a resolution, the right of the mayor to give the casting vote, to our knowledge, has never been called in question, although such power under such circumstances has been frequently exercised.

In *Launtz v. People*, 113 Ill. 137, the charter of the city of East St. Louis authorized the mayor to give the casting vote in case of a tie in the common council. On the adoption of a motion to approve the bond of the city treasurer, four of the eight members of the council voted in the affirmative, the other four refusing to vote, either in the affirmative or negative. It was said by the court in that case, that the mayor might treat those who refused to vote as being opposed to the motion, and the result would be equivalent to a tie, and would, therefore, warrant him in voting as in case of a tie. In the appeal of *Carroll v. Wall*, 35 Kan. 36, 10 Pac. 1, it was held that where the mayor, under the law, had the casting vote when the council was equally divided, he had the power, where a tie resulted on a motion to confirm the appointment of a city attorney, to give the casting vote. These decisions will, at least, serve to illustrate that a tie vote of an assembly, in which event a certain person designated by law is entitled to vote, may, and does arise, whether the proposition or matter before the body is attempted to be carried out by the means of a ballot, or by a *viva voce* vote on a motion or resolution.

The very purpose for which the law requires the township trustees to assemble on the day and at the place fixed is to appoint a superintendent, and under no circumstances does the statute contemplate that this purpose or object shall be defeated by any "maneuvering" or "jockeying" upon the part of those charged with the duty of making such appointment. Should we hold the grounds upon which counsel for appellant found their contention to be tenable, then, under similar circumstances, the contest for the appointment of a superintendent might be indefinitely prolonged, and an election of any one prevented. No construction should be placed upon the statute which might lead to such a result. The legislature, in empowering the auditor to vote in case of a tie, no doubt considered the fact that the trustees might be equally divided, not only on the question as to the individual to be chosen to fill the office, but also on propositions preliminary to making the appointment, and, in case of a tie on any such preliminary question, the auditor must be held to have the right to give the casting vote for or against such proposition. It cannot be said that the appellee herein, under the facts, did not receive a majority of all the votes cast by the electoral body upon the occasion in question; for, as the auditor is empowered to vote in case of a tie, consequently, upon the happening of that event, at least, for the purpose of giving the casting vote, that officer must be deemed and considered to that extent as one of the electoral body, and to his vote the law accords the same force and effect as to that of any one of the trustees, and when cast in the affirmative, as it was in this case, it serves as the crowning act in the election.

We are constrained to hold that the auditor in each instance herein mentioned was entitled to vote, and

 Reid v. Reid *et al.*

therefore the resolution was legally adopted and the appointment of the appellee to the office in dispute is in all respects valid. He was not only, under the circumstances, permitted to vote, but the law expressly required him to discharge that duty.

We are aware that the doctrine affirmed in the case of *State v. Edwards*, 114 Ind. 581, sustains the contention of appellant's learned counsel, and therefore that case is in direct conflict in this respect with the conclusion reached in this appeal. It may be said, however, that the construction placed upon the statute relative to the right of the auditor to vote in that decision is narrow and apparently strained, and is unquestionably contrary to the very spirit or object of the law, and so far as the holding therein conflicts with that in this case, it must be considered and held to be overruled. Some of the earlier decisions of this court, in construing the statute in question, were inclined to be too strict, while the later ones are more liberal, and, as we believe, more in harmony with the spirit or intent of the law. See *Wampler v. State*, 148 Ind. 557.

The judgment below, under the facts and the law applicable thereto, is a correct result, and is therefore affirmed.

 REID v. REID ET AL.

[No. 18,170. Filed January 12, 1898.]

140	274
151	357
151	531

APPEAL.—*Record.*—*Pleadings.*—The pleadings constitute the foundation of a cause of action and must be made a part of the record on appeal in order that the Supreme Court may be able to determine who the parties were to the suit, and to what extent their interests were affected by allegations or admissions therein.

From the Lawrence Circuit Court. *Affirmed.*

J. E. Henley and J. B. Wilson, for appellant.
James H. Willard, for appellees.

HACKNEY, J.—The transcript contains an assignment of eight specifications of error. The record, however, omits all of the pleadings in the cause, although they were quite numerous, and included complaint, amended complaint, answers and amended answers, cross-complaint, and answers and amended answers thereto, and replies.

With this omission, and the failure of the record otherwise to disclose the same, we are unable to determine who were parties to the suit, and to what extent their interests were affected by allegation or admission. The essential basis of a cause, the pleadings, not being before us, we are supplied with no ground upon which to consider the assignment of error. We cannot know the character of the suit, the parties interested, or the correctness of the conclusions reached without the pleadings, the foundation upon which the proceedings were constructed, the point of view from which every step must be scrutinized. It is no more possible for this court to consider the action of the trial court without the pleadings in a cause than for the trial court to gather the scope of the issues between the parties, determine the relevancy of the evidence, and, by judgment, adjust the rights of the parties, without pleadings.

The pleadings constitute the foundation upon which the superstructure of the cause must rest, and without them there can no more be a cause than there can be a building of brick and stone without foundation.

Appellant attempts to assail the action of the lower court in setting aside a judgment of partition and finally adjudging that he take nothing by his complaint. This action of the court was sought upon the petition filed in the original cause, before the disposition of the property, upon a finding of its inadvisability, and, while objecting to the action of the court for

Evansville, etc., R. R. Co. v. The State, *ex rel.* Town of Ft. Branch.

want of notice, the appellant entered his full appearance to the petition. The findings of the court, upon the petition, disclose that in proceedings, after judgment of partition, the property was sold by the administrator of the estate from which appellant claimed to inherit the interest he sought to have set off, that later the purchaser from the administrator had his title quieted, and that appellant was a party to and precluded by each of said proceedings. We do not recite these facts as the basis of a decision, but as suggesting the lack of merit in the appeal.

The record presenting no question for decision, the judgment is affirmed.

**EVANSVILLE & TERRE HAUTE RAILROAD COMPANY v.
STATE, EX REL. TOWN OF FORT BRANCH.**

[No. 18,187. Filed January 18, 1898.]

HIGHWAYS.—Streets.—Railroads.—Street and Railroad Crossings.—

Municipal Corporations.—A railroad company is required by statute to construct crossings over its tracks where the same crosses the streets of an incorporated town, and the failure of a town to enact an ordinance requiring a railroad company to construct such crossing will not relieve the company of such duty. *pp.* 277, 278.

SAME.—Street and Railroad Crossings.—Municipal Corporations.—

The duty of a railroad company to construct street crossings over its tracks is the same whether the street or highway was opened before or after the railroad was built. *p.* 278.

SAME.—Railroads.—Street Crossings.—Complaint to Require Construction of Crossing.—Municipal Corporations.—A complaint against a railroad company by an incorporated town to require it to construct street crossings across its tracks which alleges the refusal of such company to construct the crossings, need not allege a demand upon the part of the town. *p.* 278.

SAME.—Railroads.—Street and Railroad Crossings.—Complaint to Require Construction of Crossing.—Municipal Corporations.—

Where a complaint in an action against a railroad company to require it to construct street crossings over its tracks alleged that such company built, operated, and maintained its tracks, sidetracks, and switches along and across such streets, it was not necessary for the

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160 589

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Evansville, etc., R. R. Co. v. The State, *ex rel.* Town of Ft. Branch.

proof or findings of the court to show that the streets were public highways and that the railroad was built across them, as it is immaterial whether the streets became such before or after the railroad was built. *pp.* 279, 280

DEDICATION.—*Street and Railroad Crossings.*—*Easements.*—*Municipal Corporations.*—Where by platted additions to a town, streets are dedicated to the public which cross a railroad track, and the railroad company constructed crossings over its track, and such streets and crossings were used by the public for general use as a public highway for six or seven years, the public acquired such rights therein as could not be divested by the railroad company tearing up the approach and crossings. *pp.* 280-282.

APPEAL AND ERROR.—*Special Finding.*—*Exception.*—Where an exception is made jointly to two or more conclusions of law, if either one is good the exception must fail. *p.* 283.

From the Gibson Circuit Court. *Affirmed.*

John E. Iglehart, Edwin Taylor and John H. Miller,
for appellant.

W. W. Medcalf and W. E. Stilwell, for appellee.

MONKS, J.—This was an action by appellee to compel appellant, by writ of mandamus, to construct a suitable and safe crossing over its tracks at the crossing of two streets in the town of Fort Branch. Appellant appeared, and filed a general denial to the complaint for the alternative writ. No alternative writ was issued. The court, at request of appellant, made a special finding of the facts, and stated conclusions of law thereon, and, over a motion in arrest of judgment and a motion by appellant for judgment in its favor, rendered judgment in favor of the appellee, and ordered a peremptory writ of mandate as to one of said streets.

The errors assigned call in question the sufficiency of the complaint, and the action of the court in overruling appellant's motion for a judgment in its favor.

The first objection urged to the complaint is that it required the court to perform a legislative act, and enact an ordinance in behalf of appellee. It is not

Evansville, etc., R. R. Co. v. The State, *ex rel.* Town of Ft. Branch.

alleged that the relator ever adopted any ordinance in regard to said crossings. In such case, the rights of the relator are the same as those of a township trustee in regard to highways. The relator had the right to enact an ordinance for the improvement of its streets, and fix the grade of the same; but the failure to do so did not relieve appellant of its duty to properly construct the crossings over its tracks where the same crossed the streets of said town. *Indianapolis, etc., R. R. Co. v. State, ex rel.*, 37 Ind. 489, 502, 504. This duty is imposed by statute in this State and also exists independent of any statute. Fifth clause of section 5153, Burns' R. S. 1894 (3903, R. S. 1881); 3 Elliott on Railroads, section 1092, 1102, and cases cited; *Indianapolis, etc., R. R. Co. v. State, ex rel., supra*; *Louisville, etc., R. R. Co. v. Smith*, 91 Ind. 119; *Evansville, etc., R. R. Co. v. Carvener*, 113 Ind. 51; *Cummins, Tr., v. Evansville, etc., R. R. Co.*, 115 Ind. 417; *Lake Shore, etc., R. W. Co. v. McIntosh*, 140 Ind. 261; *Lake Erie, etc., R. R. Co. v. Cluggish*, 143 Ind. 347, 351; *Cincinnati, etc., R. R. Co. v. Claire*, 6 Ind. App. 390, 394; *Egbert v. Lake Shore, etc., R. W. Co.*, 6 Ind. App. 350; 4 Am. & Eng. Ency of Law, 907, 908. This duty of railroad companies is the same whether the highway was laid out and opened before or after the railroad was built. *Louisville, etc., R. R. Co. v. Smith, supra*; *Lake Erie, etc., R. R. Co. v. Cluggish, supra*; *Egbert v. Lake Shore, etc., R. W. Co., supra*, p. 353.

The next objection is that the complaint fails to allege a demand on the part of the relator that appellant construct said crossings. The refusal of appellant to construct said crossings is alleged in the complaint, and, even if the demand was necessary, as insisted by appellant, which we do not decide, the same was unnecessary after such refusal. In *State, ex rel., v. Board, etc.*, 45 Ind. 501, the court, on p. 503, said:

Evansville, etc., R. R. Co. v. The State, *ex rel.* Town of Ft. Branch.

"In order to lay the foundation for issuing the writ, there must have been a refusal to do that which it is the object of the writ to enforce, either in direct terms, or by circumstances distinctly showing an intention in the party not to do the act." The same doctrine is declared in *Lake Erie, etc., R. R. Co. v. State, ex rel.*, 139 Ind. 158, p. 160. It is clear that the objections urged to the complaint are not tenable.

It is insisted by appellant that the court erred in overruling its motion for a judgment in its favor on the facts found, because it is alleged in the complaint that appellant's road was constructed over the streets named, and the facts found are that when said road was constructed, said streets were not laid out, platted, or used as streets, and that, for all that appears, said railroad was constructed before the town of Fort Branch was known.

It is alleged in the amended complaint, in substance, that appellant built, operated, and maintained its tracks, sidetracks, and switches along and across the streets known as "Walnut street" and "Williams street." Under such allegations, it was sufficient to prove that said appellant either built or operated and maintained its tracks across said streets, or either of them. It was not necessary to prove, or for the court to find, that said streets, or either of them, were public highways, and that said railroad track was built on and across the same.

It is not material whether said streets, or either of them, became such before or after the railroad was built. Neither is it material how the same became streets, whether by dedication or otherwise, or whether before or after the town of Fort Branch was incorporated. If said streets, or either of them, or any part thereof, were dedicated to the public use before the town of Fort Branch was known, or before it was

Evansville, etc., R. R. Co. v. The State, *ex rel.* Town of Ft. Branch.

incorporated, no change in the form of government or its territorial boundaries would defeat such dedication. Elliott on Roads and Streets, 88.

It is next insisted by appellant that the motion for a judgment in its favor should have been sustained, because the special finding does not show any public highway across its right of way at the points alleged in the complaint, either by dedication or otherwise. The part of the finding concerning said streets is as follows: "Prior to the year of 1890, the lands on the east and west side of said railway, and adjacent thereto and extending several blocks east and west, were platted and laid off into town lots, as a part of said town, and both Walnut and Williams streets were designated by the owners of the land as streets of said town, of the width of forty feet, and by said plats shown to extend east from the east line of appellant's right of way, and west from the west line of appellant's right of way. That about the years 1881 or 1882, the supervisor of highways, acting under instructions from the township trustee, graded Walnut street to the east side of the railroad track, and built an approach over a ditch to said track, and about the same time the railroad company graded and planked their three tracks at said crossing, and the work then done made a safe and convenient crossing for horses, vehicles, and footmen along Walnut street, and across appellant's tracks. Said crossing was kept in repair and used by the public as a public highway for a period of six or seven years. That said use of Walnut street and crossing of appellant's tracks was extensive, being used by farmers in hauling wheat to an elevator situated on appellant's tracks immediately south of said crossing, and others, both on foot and in vehicles. That said use was with the consent of appellant, and continued for such a length of time that

Evansville, etc., R. R. Co. v. The State, *ex rel.* Town of Ft. Branch.

public accommodation and private rights might be materially affected by an interruption of the right so to use such street and crossing. That in the year 1888 appellant tore up and took away the approach built by the supervisor, took out the planking between the tracks, and built another switch across said street, and since that time said crossing has not been used by the public and is not safe or convenient to use as a crossing."

The intent of the owner to devote his land to a public use is an essential element of dedication, and without it there can be no valid dedication. *Bidinger v. Bishop*, 76 Ind. 244. Such intention may be implied from the declarations, acts, or conduct of the landowner. When the acts and conduct of the landowner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon such acts and conduct, the fact that the landowner may have had a different intention from the one manifested is of no consequence. Such secret intention cannot prevail against his conduct and acts, upon which the public have relied. *Pittsburg, etc., R. W. Co. v. Noftsgger*, 148 Ind. 101; *Lake Erie, etc., R. R. Co. v. Town of Boswell*, 137 Ind. 336, 343; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 213-215; *Faust v. City of Huntington*, 91 Ind. 493, 496; *Elliott, Roads and Streets*, 92, 96.

An implied dedication arises by operation of law from the acts of the owner. *Town of Marion v. Skillman*, 127 Ind. 130, 136. When such dedication is accepted by the public it becomes irrevocable. *City of Indianapolis v. Kingsbury*, *supra*, p. 213; *Faust v. City of Huntington*, *supra*, p. 494; *Washburn's Easements*, section 21, p. 139; *Elliott, Roads and Streets*, 119.

Evansville, etc., R. R. Co. v. The State, *ex rel.* Town of Ft. Branch.

The intention of appellant to dedicate to the public use a strip across its right of way, as a continuation of Walnut street, is clearly and unequivocally manifested by its conduct in grading and planking its three tracks at said crossing, thus, with the work done by the road supervisor, making a safe and convenient crossing over said tracks for public travel, and by consenting to said strip being used and worked as a public highway for a period of six or seven years; and the public, by grading Walnut street to the east side of the track, and building an approach to said track over a ditch, and keeping said crossing in repair, and using the same as a public highway for said period, accepted said dedication. The public, by building said approach and keeping said strip in repair as a part of Walnut street, as a public highway, for the period of six years, acquired such rights as could not be divested by the act of appellant in tearing up said planking in 1888. Washburn on Easements, section 19, p. 139; *Town of Marion v. Skillman*, *supra*, p. 136; *City of Indianapolis v. Kingsbury*, *supra*, 213-215; *Faust v. City of Huntington*, *supra*.

If dedication may be regarded as an ultimate fact, yet, as the facts found admit of but one conclusion, that of dedication by appellant, the finding of such ultimate fact was unnecessary.

This court, however, in *City of Indianapolis v. Kingsbury*, *supra*, 222, speaking of a finding of dedication, said: "Much stress is placed upon a statement contained in one of the specifications of the special finding that the street south of Market street was never dedicated to the public. But this is a mere conclusion of law improperly blended with matters of fact, and cannot govern the facts. Courts always act upon facts found and never upon mere conclusions of law wrongly cast into a special finding."

Relender v. The State, *ex rel.* Utz, Prosecuting Attorney.

It follows that the court did not err in overruling said motion. What we have already said disposes of the exceptions to the conclusions of law. Besides the court stated two conclusions of law, the first, as to Williams street, in favor of appellant; the second, as to Walnut street, in favor of appellee. Appellant excepted to them jointly, and not severally, and it is well settled that, if either one is good, the exception must fail. *Royse v. Bourne*, *ante*, 187; *Clause Printing Press Co. v. Chicago, etc., Bank*, 145 Ind. 682, 688, 689; *Saunders v. Montgomery*, 143 Ind. 185.

No objection is pointed out to the first conclusion, and we think it is correct. The first conclusion being correct, under the rule stated, appellant's exceptions to both conclusions must fail.

Judgment affirmed.

RELENDER v. THE STATE, EX REL. UTZ, PROSECUTING ATTORNEY.

[No. 18,868. Filed January 13, 1898.]

OFFICERS.—*Residence*.—*County Commissioner*.—*Constitutional Law*.

—By the provision of section 6, article 6 of the constitution requiring all county officers to reside in their respective counties, a county commissioner is required to reside in the county where he serves as such officer, not in the general sense of the term, but he is required to actually reside therein during the time he is the incumbent of the office. *pp.* 287, 288.

SAME.—*Residence*.—*Removal*.—*Abandonment*.—Where a county commissioner violates the provision of section 6, article 6 of the constitution requiring county officers actually to reside in the county in which they hold office, by voluntarily ceasing to reside therein during his term of office it will operate as an abandonment of the office, and *ipso facto* a surrender of all rights and title to the office. *p.* 288.

SPECIAL FINDING.—*Must Contain the Ultimate or Inferential Facts*.—

It is the inferential or ultimate facts established by the evidence which the special finding is designed to disclose and mere evidentiary facts will be disregarded.

OFFICERS.—*Residence*.—*Removal*.—*Abandonment*.—*Burden of Proof*.

—In an action to remove a county commissioner from office on the

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150	487

Relepler v. The State, *ex rel.* Utz, Prosecuting Attorney.

ground that he had abandoned the office by removing from the State, the burden was on defendant to establish that his removal was only temporary, and where the special finding is silent in this respect it will be presumed that such fact was found adversely to the party upon whom rested the burden of proving it. *p.* 290.

OFFICERS.—Residence.—Removal.—Abandonment.—Where a county officer by removing to another State abandons his office, he cannot by returning again to the county legally resume the office. *p.* 290.

SAME.—Ejection.—An action by the State on the relation of the prosecuting attorney to eject an alleged usurper from office is not a mere controversy between two persons to determine which one has the best title to the office, but the defendant must recover on the strength of his own title to the office and not upon the infirmity of that of his alleged successor. *pp.* 290, 291.

SAME.—Removal.—Qualification.—In an action to eject a county commissioner from office on account of his removal from the county, a finding that the person to succeed him as such commissioner was duly elected and commissioned as such officer shows *prima facie* that he was eligible to the office in controversy. *p.* 291.

From the Floyd Circuit Court. *Affirmed.*

A. Dowling and G. H. Hester, for appellant.

George H. Voigt and Evan B. Stotsenburg, for appellee.

JORDAN, J.—Action by the State, upon an information filed by the proper prosecuting attorney on his own relation, to expel the appellant from the office of commissioner of the county of Floyd. The information substantially charges that the defendant was duly elected as a member of the board of commissioners of the county of Floyd, State of Indiana, at the November election in 1894; that he qualified as such commissioner, and discharged the duties of the office, until the 15th day of June, 1896, when he abandoned said office, and removed to the state of Colorado, where he has since resided; that at the November election of 1896 one Martin H. Mann was duly elected to fill said office, and has qualified as such officer, and is entitled to hold said office for the unexpired term; that on the 3d day of December, 1896, notwithstanding

Relender v. The State, ex rel. Utz, Prosecuting Attorney.

ing his abandonment of the office, the defendant usurped it, and has ever since withheld the same from said Mann. The prayer is that a judgment of ouster be rendered by the court. On the issues joined, there was a trial, and the court made a special finding, and stated, adversely to the appellant, its conclusions of law, and rendered a judgment ousting him from the office, and ordered that the possession thereof be delivered to Mann.

The sufficiency of the information is not assailed. The only question presented for our decision relates to the sufficiency of the facts found by the court to support the conclusions stated and judgment rendered. The special finding substantially sets out the following facts: The defendant, appellant here, was elected to the office of county commissioner of the county of Floyd, in the State of Indiana, at the November election in 1894, and duly qualified as such commissioner, and discharged the duties of the office until June 15, 1896, when he, with his family, removed to the state of Colorado, taking with him his personal property, except a small portion thereof, where he has ever since resided, and now resides, with his family, prosecuting his usual occupation of a groceryman, and where he has for an indefinite time located his residence, "with the disclosed intention of returning to New Albany, Floyd county, Indiana, when his and his daughter's health had improved, and when he had made all the money he could." That since the defendant has so located his residence in the state of Colorado, he has returned at intervals to Floyd county, and attended every regular session of the board of commissioners of that county, except the March session of 1897, and again returned to the state of Colorado, where he now is, at his residence aforesaid. He has not attended any of the special sessions of said

Relender v. The State, ex rel. Utz, Prosecuting Attorney.

board of commissioners held in the year of 1896, on July 3 and 13, August 1, 3, 4, 5, and 6, and on October 17, 26, 27, 28, 29, 30, and 31, and on November 2, 4, 5, 6, 7, and 21. When the defendant left Floyd county, on June 15, 1896, to go to Colorado, he left his post office address with the auditor, and requested him to notify him when wanted. No successor was appointed by the board of commissioners to succeed the defendant. The finding further discloses that at the general election held in November, 1896, in Floyd county, Indiana, for an election, among other officers, of a county commissioner for the first district in said county, being the same from which appellant was formerly elected, Martin H. Mann received the highest number of legal votes cast for said office, and was duly elected thereto for the unexpired term; that said Mann received a certificate of his election to said office, and duly qualified as such commissioner; that at the next regular session of the board of commissioners of the said county of Floyd, after his said election, which convened on December 3, 1896, Mann presented himself to said board, and attempted to act as a member thereof; but the defendant, being present at the time, would not permit him to act or take his place as a member of said board, or discharge the duties of his office, and ever since has refused to permit Mann to take his place and act as such commissioner. The court, upon the facts found, declared the law to be, in substance, as follows: (1) By the defendant's removal to Colorado and his subsequent residence in said state, when a member of the board of commissioners of the county of Floyd, State of Indiana, he voluntarily disabled himself to discharge the duties of the office, and thereby abandoned the same, and by said act the office became vacant from the time of his said removal; (2) that Mann is now, and ever since he was elected and quali-

Belender v. The State, ex rel. Utz, Prosecuting Attorney.

fied has been entitled to hold said office; (3) that on December 3, 1896, the defendant usurped the said office of county commissioner, and ever since the said date has withheld the same from said Mann, and that the defendant ought to be ousted from the office, and possession given to Mann. The contention of counsel for appellant is that the facts do not warrant the conclusion that appellant abandoned the office in controversy, and thereby surrendered his right and title to the same. It is urged that the finding of facts shows that appellant's removal to the state of Colorado was but a temporary sojourn, and under the circumstances, was not an abandonment of the office. This claim, as made by appellant, is earnestly controverted by counsel for the State, and they contend that the legitimate inferential facts found by the court fully authorized its judgment.

The constitution of the State requires that: "All county, township, and town officers shall reside within their respective counties, townships, and towns; and keep their respective offices at such places therein, and perform such duties as may be directed by law." Const., Art. 6, section 6. Section 7815, Burns' R. S. 1894 (5731, R. S. 1881), provides for the organization in each county in this State of a board of county commissioners for the transaction of county business. Such boards are each to consist of three members, who must be qualified electors of the county, and are required to be elected by the voters of the entire county from the respective districts. Section 7816, Burns' R. S. 1894. A "county commissioner," as he is usually designated, is charged under the statutes with the performance of important public duties when acting as a member of his board; and such boards are considered the agency of the county through which its business is transacted. The members thereof also dis-

Belender v. The State, ex rel. Utz, Prosecuting Attorney.

charge such other public duties as the law directs. Not only are they invested with duties of an administrative character, but are also clothed in some instances with powers of a judicial nature. Each commissioner takes an oath required by law to faithfully discharge the duties of his office, and the law requires him to perform these duties in person, as there is no authority given to perform them by means of a deputy. Members of a board of commissioners are certainly county officers, and, by the positive command of the constitution, they are required to reside within the county where they serve as such officers, and perform such duties as the law may direct. The provision of our fundamental law which restricts the residence of a county officer to his county must be construed as requiring him to be a resident thereof,—not in the general sense of that term, but he is required to actually reside therein during the time he is the incumbent of the office. This holding is fully supported by the decision in the appeal of *State v. Allen*, 21 Ind. 516.

That the title of a public officer may be terminated and his office vacated by abandonment is a rule of the law settled beyond controversy. As the constitution exacts of a county officer the duty to actually reside in the county in which he holds his office, if he violates this provision of the law, by voluntarily ceasing to reside therein, during his term, it will operate as an abandonment of the office, and, *ipso facto*, a surrender of all of his right and title to the office. *State v. Allen, supra*; *Yonkey v. State*, 27 Ind. 236; *Gosman v. State*, 106 Ind. 203, p. 208; *Osborne v. State*, 128 Ind. 129; *Mechem Pub. Officers*, sections 437, 438 and 439; 19 Am. and Eng. Ency. of Law, p. 562c*; *Bishop v. State, ante*, 223.

Of course, there is a well affirmed exception to this general rule, which is that a merely temporary re-

Relender v. The State, ex rel. Utz, Prosecuting Attorney.

moval or absence for a limited time by the officer from the county or district to which his residence has been restricted by law, with no intention to abandon his office, or cease to discharge the duties thereof, will not result in terminating his title. The question, then, is: Do the facts in this case, when tested by the legal principles to which reference has been made, establish that the appellant abandoned the office, and thereby created a vacancy?

The following, when stripped of the items of evidence, would seem to be the facts upon which the first conclusion of law stated by the court is based: After the appellant was installed into the office in question, he continued to discharge its duties until the 15th day of June, 1896, "when he removed with his family to the state of Colorado * * * where he has ever since resided, and now resides with his family, prosecuting his usual occupation of a groceryman, and where he has, for an indefinite time, located his residence." In this statement we have eliminated the following recitals, embraced in the special finding: "Taking with him his personal property, except a small portion thereof, * * * with the disclosed intention of returning to New Albany, Floyd county, Indiana, when his and his daughter's health had improved, and he had made all the money he could." These facts, and likewise those relative to the return at intervals by appellant to Floyd county, and assuming to act as commissioner, after he had removed to Colorado, are evidentiary in their nature, and can serve no legitimate purpose, for this reason, in the special finding, and must therefore be disregarded. It is the inferential or ultimate facts established by the evidence in the case which the special finding is designed to disclose, and not those which are merely evidentiary.

Relender v. The State, ex rel. Utz, Prosecuting Attorney.

Whitcomb v. Smith, 123 Ind. 329; Elliott's App. Proced., section 757.

While the evidentiary items recited in the special finding might be influential on the trial in the lower court as tending to show that appellant's removal from the county was but temporary, and that he had not terminated his residence therein, and did not intend to abandon the office, they can have no such bearing when embraced in a special finding, nor serve to break the force of the inferential facts therein stated. If, as counsel for appellant insist, his removal to Colorado was only for a temporary sojourn in that state, the burden was on him to establish that material fact; and, as the finding in this respect is silent, we are bound to presume that such fact was found adversely to him upon whom the burden of proving it rested. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; Elliott App. Proced., section 757.

When the appellant had once terminated his residence in Floyd county, by becoming a resident of the state of Colorado, and by such act had surrendered his right and title to the office, he could not, upon returning again to that county, legally resume the office; and his action, under the circumstances, in serving as a member of the board could be nothing more than usurpation. *Yonkey v. State, supra*; *Bishop v. State, supra*.

We are of the opinion that from the facts found by the court it is established that appellant, in a legal sense, abandoned the office, and thereby it became vacant, and that the court's conclusion in this respect must be sustained.

Counsel contend that the third and fourth conclusions are each unwarranted by the facts, for the reason that there is no finding that Mann was eligible to the office. Counsel urge that he may be ineligible for

Relender v. The State, ex rel. Utz, Prosecuting Attorney.

the reason that he is a minor, or a nonresident of the county. But as a rejoinder to this contention, it may be said that in this action the State, by its own officer, is the moving party in seeking to eject the appellant from the office of which he is an alleged usurper. His right to hold the office therefore depends upon the strength or validity of his own title, and not upon any infirmity that may attach to or exist against that of Mann. The controversy involved in this suit is not one merely between two persons to determine which one has the best title to the office. In such cases it is true that the one who seeks to expel an incumbent of an office, and gain admission thereto himself, must allege and prove his eligibility. Or, in other words, if the complaining party in such action prevail at all, he is required to do so on the strength of his own title. *McGee v. State*, 103 Ind. 444, on p. 446, and cases there cited; *Reynolds v. State*, 61 Ind. 392, p. 403.

But, aside from this view of the case, there is an express finding that Mann received the highest number of legal votes at such election for the office, and was given a certificate of his election, and qualified as such commissioner. These facts, at least, are *prima facie* sufficient to show that he was elected and entitled to the office in controversy. *State v. Shay*, 101 Ind. 36; *McCrary on Elections*, sections 219, 220, 221, and 222.

Under the facts found by the trial court, and the law applicable thereto, all of the court's conclusions of law are substantially correct, and the judgment rendered is a right result, and is therefore affirmed.

The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

THE STATE, EX REL. GOODMAN, PROSECUTING ATTORNEY, *v.* HALTER.

[No. 18,218. Filed Sept. 17, 1897. Rehearing denied Jan. 18, 1898.]

LIMITATION OF ACTIONS.—*When Applicable to Actions Brought by State.*—Section 805, Burns' R. S. 1894 (304, R. S. 1881), providing that limitations of actions shall not bar the State of Indiana, except as to sureties, applies only when the action is by the State in its own interest or in the interest of the public, and has no application where the State is but a nominal party. *pp.* 293-297.

SAME.—*Pleading.*—*Action by State.*—*Party in Interest.*—*How Determined.*—Where the statute of limitations is pleaded in an action where the State is plaintiff the court must determine from the entire record whether the action seeks to enforce a public right, in the interest of the public, or a private right, for the benefit of a private person. *p.* 297.

TAXATION.—*Action for Failure to List Property.*—*Action by State.*—The fact that section 8458, Burns' R. S. 1894, fixing a penalty for failure to list property for taxation authorizes the prosecuting attorney to bring an action for the violation thereof, instead of the Attorney-General, and provides that the proceeds thereof be paid into the county treasury, instead of the State treasury, in no way changes the public nature of the proceeding. *pp.* 298-300.

SAME.—*Action for Failure to List Property.*—*Repealed Statute.*—By virtue of the provisions of section 248, Burns' R. S. 1894 (248, R. S. 1881), penalties and forfeitures incurred by taxpayers under section 6339, R. S. 1881, may be recovered the same as if said section had not been repealed by the tax law of 1891. *pp.* 300-302.

SAME.—*Tax Certificates.*—Tax certificates are property, and are taxable under the tax law of 1891, as amended by the act of 1895, Acts 1895, p. 26. *p.* 302.

PLEADING.—*Demurrer.*—*Answer.*—Where an answer does not purport to answer the whole complaint, which was in one paragraph, a demurrer to such answer could not be carried back and sustained to the complaint. *p.* 302.

TAXATION.—*Failure to List Property.*—*Penalty.*—*Action For.*—The State has a separate action under the tax laws of 1881 and 1891 for each year a taxpayer gives a false or fraudulent list, schedule, or statement, or fails or refuses to deliver to the assessor a list of taxable property which he is required to list. *p.* 302.

SAME.—*Failure to List Property.*—*Complaint.*—In an action under section 8458, Burns' R. S. 1894, to recover penalties for failure to list property for taxation for more than one year, the cause of action

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The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

for each year should be stated in a separate paragraph of complaint. *pp.* 302, 303.

TAXATION.—*Failure to List Property.*—*Foundation of Action.*—*Complaint.*—In an action to recover the penalty provided by section 8458, Burns' R. S. 1894, for failure to list property for taxation the alleged fraudulent tax lists given are not the foundation of the action and need not be filed with the complaint. *p.* 303.

APPEAL AND ERROR.—*Record.*—*Bill of Exceptions.*—A motion made, and the ruling of the court thereon, to strike out part of a complaint does not become a part of the record by being copied therein by the clerk, but such motion and ruling must be brought into the record by bill of exceptions. *pp.* 303, 304.

SAME.—*Record.*—Where a motion made and sustained to strike out part of a complaint is not made part of the record by bill of exceptions, the court will consider the complaint as copied in the record, and has no power to disregard the portion stricken out. *p.* 304.

SAME.—*Rehearing.*—Questions not discussed in the briefs filed before the case is decided are waived, and will not be considered on petition for rehearing. *p.* 305.

From the Knox Circuit Court. *Reversed.*

William A. Ketcham, Attorney-General, *John T. Goodman*, *W. A. Cullop* and *C. B. Kessinger*, for appellant.

Smith & Korbly and *Cauthorn, Dailey & Cauthorn*, for appellee.

MONKS, J.—This action was brought by appellant to recover from appellee the penalties fixed by statute for giving false lists of his taxable property to the assessor for 1895, and former years. An answer in four paragraphs was filed. Appellant's demurrer to the first paragraph of answer was overruled, and appellee having withdrawn the second, third, and fourth paragraphs of answer, and appellant refusing to reply to said paragraph, judgment was rendered in favor of appellee.

The only error assigned and not waived calls in question the action of the court in overruling appellant's demurrer to the first paragraph of answer.

The first paragraph of answer set up the two years' statute of limitation as a bar to so much of the com-

The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

plaint as sought to recover penalties for appellee giving false lists of his taxable property for each of the years 1891, 1892, and 1893. The amended complaint sought to recover penalties for each of the years, 1881 to 1895, inclusive. Section 294, Burns' R. S. 1894 (293, R. S. 1881), upon which the first paragraph of answer is based, provides that actions for forfeiture or penalty given by statute shall be commenced within two years after the cause of action has accrued, and not afterwards. It is expressly provided, however, by section 305, Burns' R. S. 1894 (304, R. S. 1881), that "Limitations of actions shall not bar the State of Indiana, except as to sureties." Under the revised statutes of 1852, the statute of limitations applied to and bound the State the same as individuals. Section 224, R. S. 1852, p. 78, section 224, 2 Gavin & Hord, p. 164, 2 Davis R. S. 1876, section 224, p. 129; *Cartright v. Briggs*, 41 Ind. 184. In 1881 the General Assembly passed an act concerning proceedings in civil cases, in which it was provided that "Limitations of actions shall not bar the state of Indiana, except as to sureties." Section 305, Burns' R. S. 1894 (304, R. S. 1881). This section restored the rule that prevailed at common law, except as to sureties, for at common law the State was not barred even as against sureties. Unless the statute expressly provides otherwise, it can not be set up as a bar to any claim or right of the State. Woods, Limitations, section 52; 13 Am. and Eng. Ency. of Law, 711, 713; *United States v. Nashville, etc., R. W. Co.*, 118 U. S. 120, 125, and cases cited; *United States v. Beebe*, 127 U. S. 338, 346; *Miller v. State*, 38 Ala. 600; *Moody v. Fleming*, 4 Ga. 115; *Josselyn v. Stone*, 28 Miss. 753, 762; *Parmilee v. McNutt*, 1 S. & M. (Miss.) 179, 182; *Hill v. Josselyn*, 13 S. & M. (Miss.) 597; *Commonwealth v. Baldwin*, 1 Watts 54, 56.

The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

In *Pennsylvania Co. v. State*, 142 Ind. 428, this court held that an action brought under the act of March 9, 1889, sections 5186, 5187, Burns' R. S. 1894, commonly called the "Black-board Law," which provides that for each violation of the "act * * * * the company shall forfeit and pay the sum of twenty-five dollars, to be recovered in a civil action to be prosecuted by the prosecuting attorney * * * in the name of the State of Indiana, one half of which shall go to said prosecuting attorney and the remainder to be paid over to the county in which such proceedings are had, and shall be part of the common school fund," was not barred in two years for the reason that, under section 305 (304), *supra*, the statute of limitations did not apply where the cause of action was in favor of the State.

Appellee admits the rule as stated, but insists that the same only applies when the action is by the State in its own interest, and has no application where the State is only a nominal party. It is true the rule does not apply to cases where the action is not by the State or in the interest of the public, but the State is a nominal party, and has no real interest in the litigation, and its name is used to enforce a right solely for the benefit of private parties, as an action in the name of the State on relation of the party in interest, on the bond of a guardian, administrator, or executor, or when a person seeks to obtain a private right by mandamus in the name of the State. *United States v. Beebe, supra*; *Miller v. State, supra*; *Moody v. Fleming, supra*; Woods on Limitations, section 52; 13 Am. and Eng. Ency. of Law, 711-713.

In *United States v. Beebe, supra*, suit was brought in the name of the United States, by the Attorney-General, to set aside certain patents, and it was held that the statute of limitations was a bar. The court said,

The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

at p. 344: "The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. *United States v. Nashville, etc., R. W. Co.*, 118 U. S. 120 and 125, and cases cited. But this case stands upon a different footing, and presents a different question. The question is, are these defenses available to the defendant in a case where the government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person? It has been not unusual for this court, for the purpose of justice, to determine the real parties to a suit by reference, not merely to the names in which it is brought, but to the facts of the case as they appear on the record. * * *

Applying these principles to the case, an inspection of the record shows that the government, though in name the complainant, is not the real contesting party to the title or property in the land in controversy. It has no interest in the suit and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied." And on page 347: "We are of the opinion that where the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend

The State, *ex rel.* Goodman, Prosecuting Attorney, v. Halter.

its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants."

The distinction that runs through all the cases is the difference between an action in the name of the State to protect the interest of the public, and an action to enforce a private right for the sole benefit of a private person. Upon reason and authority, therefore, the rule is that, when the statute of limitations is pleaded in an action where the State is plaintiff, the court must determine, from an examination of the entire record, whether the action seeks to enforce a public right, in the interest of the public, or a private right, for the benefit of a private person. If to enforce a public right, in the public interest, the statute of limitations is not applicable; but if to enforce a private right, in a private interest, the statute is applicable, although the State is named as plaintiff.

It becomes necessary, therefore, to determine whether this action is brought in the interest of the public, to enforce a penalty for the benefit of the public, or whether it is merely a private action, to enforce liability in a private interest.

The power of taxation is essential to the very existence of government, and it is therefore inherent in the State. It is a legislative power, and is limited only by the provisions of the constitution. The constitution in this State provides that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only,

The State, *ex rel.* Goodman, Prosecuting Attorney, v. Halter.

for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law." Const., art. 10, section 1.

The legislature has enacted a tax law, under which it is the duty of every person liable to be assessed to deliver to the assessor, when called upon for that purpose, a full, true, and correct description of all of the personal property owned, held, possessed, or controlled by him on the first day of April of that year, and that he fix what he deems the true cash value thereof to each item of property. Section 8458, Burns' R. S. 1894. It is further provided that, if any person shall give a false or fraudulent list, schedule, or statement required by the statute, or shall willfully fail or refuse to deliver to the assessor, when called upon for that purpose, a list of the taxable property which he is required by law to list, said person or corporation shall be liable to a penalty of not less than \$50.00, nor more than \$5,000.00, to be recovered in any proper form of action, in the name of the State of Indiana on the relation of the prosecuting attorney. It is under the provisions of this section, and one of like import passed in 1881, that this action was commenced. Independent of the statute, there would be no right of action whatever. This and other sections of the tax law were made to compel a careful observance of the law by the taxpayer, and to punish the faithless or dishonest taxpayer for his omission of this duty to the State.

Upon the tax lists and schedules as returned, when accepted by the taxing officers, taxes are levied, not simply for the locality in which the taxpayer resides, but for the benefit of the State. It is through the lists, schedules, and statements mentioned, and upon the assessments made thereon, that the State derives the greater part of the revenue upon which it exists. If

The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

no property was returned to the taxing officers, or valued by them, for taxation, no taxes could be levied or collected, and the state government, as well as all subdivisions thereof for governmental purposes, would, under our system of government, have no revenues upon which to exist. If no taxes were paid, the State would have no revenue, and to the extent that there is a fraudulent failure or refusal to comply with the requirements of section 8458, *supra*, not corrected or supplied by the taxing officers, to just that extent are the revenues of the State diminished; and it was for the purpose of preventing such fraudulent conduct, and the result thereof upon the public revenues, both local and State, that said section was enacted. It was competent for the State to have provided in said section that the actions thereunder should be brought by the Attorney-General, and that the proceeds, when collected, should be paid into the State treasury.

The legislature, in its discretion, however, provided that instead of the action being brought by the Attorney-General, it should be brought by the prosecuting attorney, and that the proceeds should be paid into the county treasury, instead of the State treasury, and that after the money is so collected and paid in, the prosecuting attorney should receive ten per cent. on the moneys collected and paid in; but this in no way changes the public nature of the action or proceeding authorized by the General Assembly, to more effectually compel a compliance with the provisions of the tax law, and thus prevent frauds upon the revenue. Said section was enacted by virtue of the taxing power of the State, one of the highest functions of the government. When any one violates the provisions of said section, the assault is upon the State itself, and any action to recover the penalty therefor is by the

The State, *ex rel.* Goodman, Prosecuting Attorney, v. Halter.

State, in the interest of the public, and for the benefit of the State. All such actions are to protect and aid the State in the exercise and enforcement of one of its highest and most important powers, one upon which its very existence depends. The particular direction which the money, when collected, is required to take, or the officer charged with the collection thereof, is simply a matter of detail resting in the discretion of the legislature, unless restrained by the provisions of the constitution (*State v. Indiana, etc., R. R. Co.*, 133 Ind. 69, 78, 80; *Pennsylvania Co. v. State, supra*, pp. 434-437), and which can in no degree affect the character of the action, or change it from one to protect the public interest to one to enforce a private right, for private purposes. It follows that the court erred in overruling appellant's demurrer to the first paragraph of answer.

Appellee insists that the amended complaint is insufficient, and that, even if the first paragraph of answer is bad, a bad answer is good enough for a bad complaint, and the demurrer should have been carried back and sustained to the complaint.

The amended complaint shows that it was an action to recover the penalty prescribed for the giving a false and fraudulent list of taxables for each of the years, 1881 to 1895, inclusive. At the time of filing the complaint, February 27, 1896, the act concerning taxation, approved March 29, 1881, had been repealed by the act of March 6, 1891. By virtue of the provisions of section 248, Burns' R. S. 1894 (248, R. S. 1881), in force since July 21, 1877, penalties and forfeitures incurred by taxpayers under section 71 of the tax law of 1881, being section 6339, R. S. 1881, may be recovered the same as if said section had not been repealed by the tax law of 1891. *Western Union Tel. Co. v. Brown*, 108 Ind. 538, 542; *Western Union Tel. Co. v.*

The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

Steele, 108 Ind. 163; *Western Union Tel. Co. v. Wilson*, 108 Ind. 308, 310; *State, ex rel., v. Helms*, 136 Ind. 122; *Bruce v. Cook*, 136 Ind. 214; *State v. Hardman*, 16 Ind. App. 357. The complaint charged that appellee had fraudulently omitted from his list a \$200.00 tax certificate for each of the years from 1891 to 1895, inclusive, and also money loaned and credits due to him, amounting to \$2,000.00 for each of the years 1881 to 1895, inclusive. In section 53, of the tax law of 1891, being section 8463, Burns' R. S. 1894, giving the form and items for the schedule to be signed by the taxpayer, tax certificates are not specifically mentioned. They were first named specifically as item five in the amendment of 1895 (Acts 1895, p. 26). It is the policy of the State, as declared in the constitution, to subject all private property, real and personal, to taxation, except such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be especially exempted by law. Const., art. 10, section 1.

Section 3 of the tax law of 1891, being section 8410, Burns' R. S. 1894, also provides that all property within the jurisdiction of this State, not expressly exempted shall be subject to taxation. Section 48 of said act, being section 8458, Burns' R. S. 1894, requires that each year the taxpayer make to the assessor a full and correct description of all his personal property, of which such person was the owner, or of which he held possession or controlled, as agent or otherwise, on the first day of April of the current year. And section 55 of the law, being section 8465, Burns' R. S. 1894, provides that any person or corporation shall be liable to a penalty of not less than \$50.00 nor more than \$5,000.00 for giving a false or fraudulent list or statement required by the act, or for willfully failing or refusing to deliver to the assessor, when called upon

The State, *ex rel.* Goodman, Prosecuting Attorney, v. Halter.

for that purpose, a list of the taxable property he is required to list under said act. Substantially the same provisions were contained in the tax law of 1881.

Tax certificates were taxable under the tax law as amended in 1895. Acts 1895, pp. 21-28. And whether taxable before we do not determine. Such certificates should have been reported by the taxpayer under item five of the schedule set forth in the amendment of 1895. Acts 1895, p. 26.

It is true, as insisted by appellee, that a demurrer to an answer to a complaint searches the record, and reaches back to, and tests the sufficiency of the complaint; but in this case the first paragraph of answer did not answer the whole of the amended complaint, which was in one paragraph. It only purported to answer so much thereof as sought to recover a penalty for each of the years 1891, 1892, and 1893, and therefore, the demurrer to said paragraph of answer could not be carried back and sustained to the amended complaint. Under the tax laws of 1881 and 1891, each of the years the tax payer gave a false or fraudulent list, schedule or statement, or willfully failed or refused to deliver to the assessor a list of taxable property he is required to list, he was liable to a separate and distinct penalty, and the State has a separate cause of action for each year. In an action to recover penalties for more than one year, the cause of action for each year should, under our code (third clause of section 341, Burns' R. S. 1894, 338, R. S. 1881) be stated in a separate paragraph, and said several causes of action should not all be included in one paragraph of complaint, as in this case. If the causes of action alleged in the amended complaint had each been stated in a separate paragraph, as required, said first paragraph of answer would have been to the three paragraphs setting up the cause of action for the years

The State, ex rel. Goodman, Prosecuting Attorney, v. Halter.

1891, 1892, and 1893, and, if said paragraphs of complaint had been insufficient, the rule would require that the demurrer to said answer be carried back, and sustained to said three paragraphs only. *Reed v. Higgins*, 86 Ind. 143; 6 Ency. of Pl. and Prac. 327-330. If the part of the complaint which said first paragraph assumed to answer was insufficient, the demurrer could only, if at all, be carried back and sustained to so much of the amended complaint as it assumed to answer, which would be for the years 1891, 1892 and 1893. And if this could be done would leave unchallenged all that part of the complaint which seeks to recover penalties for the years 1881 to 1890, inclusive, and the years 1894 and 1895.

The false and fraudulent tax lists alleged to have been given by appellee for each of the years 1881 to 1895, inclusive, were not the foundation of the action, and the failure to file the same, or copies thereof, with the amended complaint did not render the same insufficient. The action was not brought upon such lists, but the right of action was to recover the penalties fixed by the tax law, because the same for each of said years were false and fraudulent.

Judgment reversed, with instructions to sustain the demurrer to the first paragraph of answer, and for further proceedings, not inconsistent with this opinion.

ON PETITION FOR REHEARING.

PER CURIAM: It is urged by counsel for appellee that the question of the taxation of tax certificates was not in the record, and was not before the court for decision, because the transcript shows that that part of the amended complaint was stricken out in the court below.

The clerk has copied into the transcript an entry showing that a motion was made to strike out a part

The State, *ex rel.* Goodman, Prosecuting Attorney, *v.* Halter.

of the amended complaint, and that the same was sustained. Said motion and the ruling of the court thereon are not made a part of the record by a bill of exceptions, and it has been uniformly held by this court, that such motions, and the ruling of the court thereon, form no part of the record, unless brought in by a bill of exceptions. *Dudley v. Pigg*, *post*, 363, and cases cited.

Such motion, and the ruling of the court thereon, although copied into the record by the clerk, form no part thereof and cannot be considered by this court. *Dudley v. Pigg*, *supra*, and cases cited.

The record does not show, therefore, that any part of the amended complaint was stricken out. The record not showing that any part of the amended complaint was stricken out, we are required to consider the same as copied into the record, and have no power to disregard the part pertaining to "tax certificates," any more than any other part thereof. *Dudley v. Pigg*, *supra*,

It is true, as contended by appellee, that the rule in this State is that a demurrer to an answer will search the record, and that a bad answer is good enough for a bad complaint; but in this case, as was said in the original opinion, the first paragraph of answer was not an answer to the whole complaint, which is in one paragraph, but only to a part of it, and in such case the demurrer cannot be carried back and sustained to the complaint. *Tracewell v. Peacock*, 55 Ind. 572. The rule urged, therefore, does not apply to this case.

The sufficiency of the complaint was not, therefore, challenged by the demurrer to the first paragraph of answer, nor is it challenged by any assignment of cross-errors.

Some questions are argued in the briefs for a rehearing that were not discussed in the original briefs. It

Sweet & Clark Co. et al. v. Union Nat'l Bank of Troy, New York.

is the settled rule that questions not discussed in the briefs filed before the case is decided are waived, and will not be considered on petition for rehearing. *Schafer v. Schafer*, 93 Ind. 586; *Funk v. Rentchler*, 134 Ind. 68, 76; *Jones v. Castor*, 96 Ind. 307, 310; *Martin v. Martin*, 74 Ind. 207, 210; *Johnson v. Jones*, 79 Ind. 141, 150; *Danenhoffer v. State*, 79 Ind. 75, 79; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464, 477.

After a review of the questions decided in the original opinion, we see no reason to change the views there expressed.

The petition for a rehearing is therefore overruled.

THE SWEET & CLARK COMPANY ET AL. v. THE
UNION NATIONAL BANK OF TROY, NEW YORK.

149	305
159	555

[No. 18,404. Filed January 25, 1898.]

RECEIVERS.—*Appointment of, to Take Charge of Property in Hands of Assignee.—Rights of Mortgagee.—Rents and Profits During Year of Redemption.*—Where mortgaged property is insufficient security for the payment of the debt, a receiver may, at the instance of the mortgagee, be appointed to collect the rents and profits, or to operate the property during the year of redemption, either before or after an assignment for the benefit of creditors.

From the Grant Superior Court. *Affirmed.*

John A. Kersey, for appellants.

W. A. Ketcham, H. J. Paulus, O. L. Cline, and F. E. Matson, for appellee.

HOWARD, C. J.—The appellee brought its action to foreclose certain mortgages, and for the appointment of a receiver; and the appellants, the Sweet & Clark Company and John C. Tibbits, assignee of said com-

Sweet & Clark Co. et al. v. Union Nat'l Bank of Troy, New York.

pany, have taken this appeal from the order appointing the receiver.

One of the assignments of error is, that the complaint does not state facts sufficient to authorize the appointment of a receiver. The complaint shows the insolvency of the appellant company, and its mortgage indebtedness to appellee in the sum of \$17,500.00, which indebtedness, so far as its chief security is concerned, is subject to a prior mortgage debt in favor of the Marion Bank, amounting to \$17,800.00; and that the mortgaged property is insufficient for the payment of the debts so secured. It is further made to appear from the complaint that the property so mortgaged, real and personal, consists of a manufacturing plant near the city of Marion, and that its value, to a large extent, depends upon its existence as a going concern; that if the factory should be shut down, the employees would be scattered, and the business injured, if not destroyed; and that it is therefore necessary for the security of this mortgagee that said property should be operated by a receiver, under the direction of the court, until the plant can be disposed of. It is also alleged that after the making of said mortgage to the Marion Bank, and after the making of the mortgages now held by the appellee, the appellant company, by deed of voluntary assignment, conveyed to its co-appellant, Tibbits, as trustee for the creditors of said company, all of its property, including the property so covered by appellee's mortgages and by the prior mortgage to the Marion Bank, and that said assignee thereupon entered into possession of the property and upon his duties under the voluntary assignment statutes of the State; that, in the course of his administration, the assignee prepared a petition to the court, asking for permission to operate said plant, and secured the signature of a large number of the creditors of the

Sweet & Clark Co. et al. v. Union Nat'l Bank of Troy, New York.

company who united in the petition, but that the petition was never presented to the court, notwithstanding which, the assignee, "without authority of law, and wrongfully," continued the operation of the factory, "and is now professing to operate the same, to the possible detriment of the creditors of said company."

It will not be questioned that so much of this complaint as precedes the references to the assignment would have constituted a sufficient application for the appointment of a receiver, in case the property had still remained in the possession of the original owner. Nor do we think that the allegations as to the assignment disclose any reason why the receiver should not be appointed. The appellee, on foreclosure of its mortgages, would certainly, under the circumstances stated, have had a right to the appointment of a receiver to secure the payment of its debt, subject, as it was, to the superior claim of the Marion Bank; and it is the law that an assignment for the benefit of creditors does not affect the rights of creditors who are secured by liens acquired prior to the assignment. 3 Am. and Eng. Ency. Law (2d ed.), 99 and 101, and cases cited. Indeed, our assignment statute itself (section 2911, Burns' R. S. 1894, 2674, R. S. 1881), provides that, before a lien-holder is entitled to share with the general creditors in any funds in the hands of an assignee, he shall first "proceed to enforce the payment of his debt by sale, or otherwise, of the property on which such lien or incumbrance exists." As to any balance of his debt left unpaid after foreclosure of his lien he may then share in the funds in the hands of the assignee. But if he may foreclose, and sell the mortgaged property, notwithstanding it may be included in the deed of assignment, it is clear, as in other cases, if it appears that the property is an insufficient secur-

Sweet & Clark Co. et al. v. Union Nat'l Bank of Troy, New York.

ity for the payment of the debt, the mortgagor may ask for a receiver to collect the rents and profits, or, as in this case, to operate the concern, during the year for redemption. By virtue of his rights as mortgagee he could do this before the assignment, and his right and remedies are no less after the assignment. See *Gilbert v. McCorkle*, 110 Ind 215, and cases cited.

From the facts appearing in the exhibits to the complaint, and in the answer of the appellant, Tibbits, all of which are also made a part of the record by order of court, the propriety of the appointment of the receiver is made still more clear. The assignee admits the insolvency of the company, and the amount of the mortgage indebtedness, and its priority to the assignment; and that the real and personal property covered by the mortgages will be of more value if used together in connection with the operation of the plant. It is averred that said property was appraised at more than \$97,000.00, but could never, since the assignment, have been sold for one-third of that sum.

It is clear, as we think, from the facts appearing in the record, that, in order that there should be sufficient realized out of the mortgaged property to pay appellee's debt, after first paying the prior lien in favor of the Marion Bank, it will be necessary to operate the factory until an advantageous private sale may be secured. Indeed, the assignee expressly admits that, "if said property had been sold at public sale, it would never have sold for sufficient to have paid said Marion Bank's mortgage, and there has been no way possible to obtain anything for said property to apply on plaintiff's [appellee's] said mortgage, except by selling the same at private sale, if it could be done."

There is no reflection upon the conduct of the assignee. He doubtless did the best that could be done in the management of the property committed to his

Sweet & Clark Co. *et al.* v. Union Nat'l Bank of Troy, New York.

charge, paying off nearly \$3,000 preferred liens. Although the voluntary assignment statutes do not contemplate that a trustee for the benefit of creditors should continue to operate a business as it was carried on before the assignment, yet the assignee in this case, with at least the tacit consent of all the creditors, continued the operation of the works until the bringing of this suit. We think it is shown that the assignee thus acted in the interests of the creditors. It was, however, at all times the privilege of any of the mortgagees to enforce the rights secured by mortgage, one of which was the right to have a receiver appointed to operate the plant, in case the value of the property was otherwise insufficient for the payment of the secured debts. Beach Rec. (Alderson's ed.), section 293; Smith Rec., section 232; 20 Am. and Eng. Ency. Law, 295, and note.

No right of the assignee is involved in the appointment of the receiver. He succeeded only to the rights of the owner of the property, subject to the incumbrances. Should there be a surplus of the proceeds of the mortgaged property after payment of the mortgage liens, such surplus will go to the assignee, to be added to the funds in his hands for distribution to creditors.

Judgment affirmed.

Manor, Auditor, v. The State, *ex rel.* Stoltz, Trustee.

149 310
151 410
151 506
149 310
157 27

MANOR, AUDITOR OF JAY COUNTY, v. THE STATE, EX REL.
STOLTZ, TRUSTEE OF BEARCREEK TOWNSHIP.

[No. 18,886. Filed January 26, 1898.]

MANDAMUS.—*Township Trustee May Compel Auditor to Issue Warrant for Funds Belonging to Township.*—Where money in the hands of a county treasurer, belonging to a township, has been apportioned, the township trustee is entitled to a writ of mandamus to compel the county auditor to issue a warrant therefor. *pp. 312, 313.*

SAME.—*Prima Facie Right to Office of Township Trustee.*—Where, in an action by the State on the relation of one claiming to be a township trustee, to mandate the county auditor to issue a warrant on the county treasurer for the funds of the township, it is shown that a vacancy in the office of trustee had been judicially determined, and that the board of county commissioners had duly appointed the relator to fill the vacancy, and that he had qualified and taken the oath of office, establishes a *prima facie* right or title of the relator to the office of trustee. *pp. 313, 314.*

COUNTY AUDITOR.—*To Whom He Must Issue Warrant for Township Funds.*—It is the duty of a county auditor to issue a warrant for township money to one who is *prima facie* entitled to the office of township trustee. *p. 314.*

TOWNSHIP TRUSTEE.—*May Maintain One Action for Funds Belonging Both to the Civil and School Townships.*—The trustee of a civil township is *ex officio* trustee of the school township, and entitled to the funds of both; and as trustee of the civil township may maintain one action for money wrongfully withheld, although the money belongs partly to each fund. *pp. 314, 315.*

MANDAMUS.—*Action to Compel Auditor to Issue Warrant to Trustee for Township Funds.—Defense.*—In an action against a county auditor to compel him to issue a warrant for the funds of the township, by one who is *prima facie* entitled to the office of township trustee, it is no defense that the title to the office of such trustee is in litigation. *pp. 315-317.*

From the Jay Circuit Court. *Affirmed.*

R. H. Hartford, for appellant.

D. T. Taylor, for appellee.

JORDAN, J.—This action was instituted by the State, on the relation of Philip Stoltz, trustee of Bearcreek township, Jay county, Indiana, to obtain a writ

Manor, Auditor, v. The State, *ex rel.* Stoltz, Trustee.

of mandate to compel the appellant, as auditor of said county, to issue a warrant on the treasurer authorizing that officer to pay over to the relator, as such trustee, certain moneys due to and belonging to said township as public revenue. The relator prevailed in the action, and a peremptory writ of mandate was awarded, commanding the appellant to issue a warrant upon the treasurer of the county, payable to the relator, for the funds belonging to his township. By the errors assigned, appellant calls in question the sufficiency of the alternative writ of mandate upon demurrer, and complains of the rulings of the court in denying his right to file his interplea, and in overruling his motion to make the complaint more specific, and in sustaining a demurrer to the first paragraph of the relator's return to the alternative writ, and in overruling a motion for a new trial. The alternative writ issued in the cause, and to which the appellant filed his return, recites the filing of a petition for the writ, and also the material facts alleged therein, which, in substance, are as follows: That on the 12th day of June, 1897, there existed a vacancy in the office of township trustee of Bearcreek township in Jay county, Indiana, which vacancy in said office had been judicially determined by the Jay Circuit Court, before said day. That on June 12, 1897, the relator was duly appointed, by the board of commissioners of the county of Jay, township trustee in and for said Bearcreek township, on account of, and by reason of said vacancy in said office. That on the 14th day of June, 1897, he, pursuant to said appointment as such township trustee, filed with the auditor of Jay county his official bond, as required by law, which was duly approved by said auditor, and took the oath of office, and was then and there duly qualified as trustee of said Bearcreek township, and is now, and ever since

Manor, Auditor, v. The State, *ex rel.* Stoltz, Trustee.

has been, the trustee of said township, and as such is entitled, under the laws of the State, to the possession and custody of all public moneys due to or belonging to said township, and especially to the possession and custody of \$3,680.00 public revenue due to said township on July 10, 1897, for the July distribution of that year as follows, to wit: (Here are set out the several amounts and the several funds to which the same belong, aggregating an amount total of \$3,680.52.) On the 19th day of July, 1897, before the announcement of this action, the relator, as such trustee, demanded of the defendant, as auditor of Jay county, that he issue a warrant on the treasurer of that county in favor of him as trustee of said township for the said funds, etc., but the defendant refused to do so, and still fails and refuses to issue said warrant. The prayer of the petition is recited in the writ, and the defendant, as auditor, is commanded to issue the warrant as prayed for, or show cause, if any, for his failure to discharge this duty. The question is, do the facts entitle the relator to the warrant for the money in the county treasury belonging to the township, of which, as the facts apparently establish, he is the trustee?

The relator, as the trustee of the township, was authorized to receive all moneys belonging to his township. Clause two of section 8068, Burns' R. S. 1894 (5993, R. S. 1881). By section 8075, Burns' R. S. 1894 (6000, R. S. 1881), the county treasurer, immediately after his annual settlement with the county auditor, upon the warrant of the latter officer, is required to pay over to the proper township trustee all moneys in his hands belonging to the township. It is disclosed that the funds for which the relator sought to obtain the warrant had been apportioned to Bearcreek township, and were due and belonging to said township at

Manor, Auditor, v. The State, *ex rel.* Stoltz, Trustee.

and before the demand was made upon the appellant for the warrant in controversy. Section 8070, Burns' R. S. 1894 (5995, R. S. 1881), provides that the trustee of the township shall superintend the financial affairs of the township, and, with the concurrence of the board of commissioners, shall, at the time therein stated, levy a tax for township, road, and other purposes, on the property of the township, and report the same to the auditor, who shall enter it on the tax duplicate; etc., and the treasurer shall collect the tax as other taxes are collected. Under section 7973, Burns' R. S. 1894 (5895, R. S. 1881), it is made the duty of the auditor, among other things, to issue a warrant on the treasurer, payable to the person entitled to receive the same, for such sums of money as may be fixed by law, etc. The duty of apportioning the several funds belonging to each township in accordance with the law rests upon the auditor, and the duty of paying the money over to the proper township trustee on the warrant of the auditor is enjoined upon the county treasurer, and in each case the duty of these respective officers relates directly to the township. It is clear under the facts that the law made it the imperative duty of appellant, as the auditor of the county, to draw a warrant on the county treasurer, payable to the proper trustee of Bearcreek township, for the money in controversy; and, as no other adequate remedy existed, such duty will be enforced by a writ of mandate. *State v. Buckles*, 39 Ind. 272; *Frisbie v. Fogg*, 78 Ind. 269; *Wampler v. State*, 148 Ind. 557, and authorities there cited; *Morris v. State*, 96 Ind. 597; *State v. Board, etc.*, 136 Ind. 207. The alternative writ does not proceed upon the theory that there is any dispute about the title to the office, or conflicting claims thereto. The sole question presented by it relates to the question of appellant's refusal, as auditor, to issue

Manor, Auditor, v. The State, *ex rel.* Stoltz, Trustee.

the warrant to the relator. It is shown that the latter had been appointed to fill an existing vacancy in the office of trustee of Bearcreek township, which, before the appointment was made, had been judicially determined. The facts disclosed that a vacancy had occurred in the office in question, which, under the provisions of section 5996, R. S. 1881, the board of commissioners is empowered to fill by appointment, and that the board had exercised this power and appointed the relator, and that he had duly qualified under said appointment by filing his bond to the approval of the auditor, and taken the oath of office as required by law. These facts, at least for the purpose of this suit, fully establish that a vacancy was recognized to exist by the appointing power, and that the relator had been rightfully appointed to fill it. *McGee v. State*, 103 Ind. 444; *Osborne v. State*, 128 Ind. 129, and authorities cited. The *prima facie* right or title of the relator to the office of trustee was thereby shown, and his right to exercise the functions thereof, among which was the authority or right to receive the money belonging to the township, followed as a necessary consequence, and, so far as the appellant was concerned it was, under the circumstances, incumbent upon him to discharge his duty in the premises by issuing the warrant in question, or show a sufficient legal excuse for his refusal to do so. The facts established that the relator was, at the time he made the demand, and at the time he instituted this action, the proper trustee of the township, and the law fully justified and protected the appellant in issuing to him, as such trustee, the warrant for the funds apportioned to his township, due and belonging thereto. It is insisted, however, that in any view of the case, inasmuch as this action is by the State on the relation of Stoltz as the trustee of the civil township, that it cannot be

Manor, Auditor, v. The State, *ex rel.* Stoltz, Trustee.

maintained, so far as it concerns the funds belonging to the school township; that in regard to such funds the suit must be on the relation of Stoltz as trustee of the school township. It is true that under the law of this state a civil township and a school township are each distinct municipal corporations, embracing the same territory, but nevertheless the trustee of the former, by the law, is made *ex officio* trustee of the latter, and as trustee he is entitled to the funds of both townships, and holds them in trust for the one to which they legitimately belong; consequently, as the trustee of the civil township, Stoltz was the proper relator, as in such capacity he represented both townships, and therefore was not required to institute another and independent action, as the trustee of the school township, in order to obtain the money belonging to the latter. See *Ross v. State*, 131 Ind. 548; *Young v. State*, 138 Ind. 206. The demurrer to the alternative writ was properly overruled. Appellant's return to the writ, which was in the nature of an answer, consisted of the general denial, and a paragraph in which he averred certain facts as an excuse or justification for his refusal to issue the warrant to the relator. These, in substance, were that at the general election in 1894 one Bishop was duly elected to the office of trustee of Bearcreek township, Jay county, Indiana, and on the 6th day of September, 1895, he duly qualified as such trustee, and entered on the discharge of the duties of the office. That subsequently in May, 1897, in an action upon information instituted in the Jay Circuit Court by the State, on the relation of the proper prosecuting attorney against Bishop, the latter was by the judgment of that court ousted from said office, and the same declared to be vacant, on the ground that Bishop had been appointed and installed as postmaster, etc. It

Manor, Auditor, v. The State, *ex rel.* Stoltz, Trustees.

is alleged that Bishop had appealed in term from said judgment to the Supreme Court of Indiana, and that since the rendition of said judgment, and the appointment of the relator to fill the vacancy, Bishop still continued to claim to be the lawful and legal trustee of Bearcreek township, and had demanded that appellant draw a warrant in his favor for the identical funds and money claimed by the relator in this action. It was further alleged that appellant, under these facts, refused to issue a warrant to Bishop until it was determined who was the legal trustee of said township, and that he is ready and willing to draw a warrant for the funds in question whenever it is settled who is the proper trustee of that township; that both the relator and Bishop are claiming the right to discharge the duties of the office, and are each demanding of appellant the right to receive said warrant, and that he "does not know and cannot know" which one is entitled to receive the money of the township until said cause appealed to the Supreme Court is finally determined therein, etc. That the demurrer to this paragraph of the return was properly sustained, we think, is evident. As heretofore said, the facts recited in the alternative writ established at least that the relator had a *prima facie* title or right to the office, and was entitled to discharge the duties thereof. The ultimate title or right of either the relator or Bishop to the office of trustee was not a matter which the appellant in this action could legitimately put in issue. He sought to be excused from issuing the warrant in controversy, for the reason that Bishop, who had been by the proper court expelled from the office, had taken a term time appeal from the judgment of ouster to the Supreme Court, and was still claiming the right to exercise the functions of the office from which the court had expelled him. The

relator had been appointed after the office had been declared vacant by the judgment of the court, and had taken the oath of office and executed and filed the official bond required by law, which, it appears, appellant, as auditor, had accepted and approved. Under the circumstances, to all intents and purposes of the law, for the time being at least, he was the proper township trustee, and, as such, authorized to receive the funds due and belonging to his township, and this was all in respect to his title or right to discharge the duties of the office that was of any material concern to the appellant. It cannot, in reason, be asserted that under the facts the safety of the public money would have been imperiled, and appellant perhaps subjected to liability, had he complied with the demand and issued the warrant to the relator; for in the event that Bishop prevailed in the cause appealed to this court, and was finally adjudged to be the proper trustee of the township, it is clear that upon such a result, as to all funds received by him as trustee during the time he was in discharge of the duties of the office under his apparent right and title, and which had not been legitimately applied to the use of the township, he would be compelled to account for and pay over to Bishop, as such trustee, and in default thereof would be liable on the bond which he had executed. But to hold that appellant was excused from the discharge of the duty imposed upon him by the statute, and thereby permit him to deprive the township of its funds until the claim of Bishop to the office is finally settled, might imperil, and, no doubt would, retard the public interests of the township, and could result in benefit to no one. It is evident that the alleged rights of Bishop to the office in question can in no manner be impaired or prejudiced by the judgment in this action. It must be remembered that this is not

Manor, Auditor, v. The State, ex rel. Stoltz, Trustee.

a direct proceeding to settle the title to the office, but one for a writ of mandate to enable the township, by and through the agency of the relator, to obtain the public money to which it is entitled. A sufficient *prima facie* title and right to the office was all, upon that feature of the case, that was involved, and the court could not, under the circumstances in this action, be required to go behind such title and determine the ultimate right of the relator to the office. In addition to the authorities heretofore cited, see the following, which fully support this principle: *State v. Board, etc.*, 124 Ind. 554; *Commonwealth v. Baxter*, 35 Pa. St. 263; *Kerr v. Trego*, 47 Pa. St. 292; *People v. Miller*, 16 Mich. 56; *People v. Callaghan*, 83 Ill. 128; *State v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116; *People v. Head*, 25 Ill. 287; *Crowell v. Lambert*, 10 Minn. 369; *Hunter v. Chandler*, 45 Mo. 452; *Ewing v. Thompson*, 43 Pa. St. 372; *Hadley v. Mayor*, 33 N. Y. 603; *Marbury v. Madison*, 1 Cranch 137; *Ex parte Heath*, 3 Hill 42; *People v. Stevens*, 5 Hill 616; Merrill on Mandamus, section 142, 154 *et seq.*; *State v. Johnson*, 35 Fla. 539, 16 South. 786, 31 L. R. A. 357, and authorities there cited. Some other questions are argued by counsel for appellant, but these in effect are decided by the conclusions herein reached, and as the judgment is clearly right under the evidence, they merit no further consideration.

Judgment affirmed.

Thistlethwaite *et al.* v. The State.

THISTLETHWAITE ET AL v. THE STATE.

[No. 18,264. Filed January 27, 1898.]

MUNICIPAL CORPORATIONS.—*Ordinance.*—*Amendment.*—*Repeal.*—

Where there is an ordinance regulating the prices to be charged by companies furnishing natural gas to consumers, a subsequent amendatory ordinance which increases the price to be charged by a particular company for a certain time, does not repeal the prior ordinance, and, on the expiration of the time, the prior ordinance controls. *pp.* 319-323.

CONTEMPT.—*Violation of Injunction.*—*Defense.*—Where a gas company violates an order of a court of equity, enjoining it from charging consumers more than a specified sum for gas, it is no defense to a prosecution for contempt, that the officers of the company acted in good faith, and without any intention of violating an order of the court. *pp.* 324, 325.

From the Hamilton Circuit Court. *Affirmed.*

T. J. Kane, R. K. Kane, and Christian & Christian, for appellants.

Stephenson, Shirts & Fertig, and Robert Denny, for State.

MONKS, J.—Appellants were fined for contempt of court, for taking, charging, and demanding more for the use of natural gas than the maximum amount fixed by an ordinance of the town of Westfield, in violation of an injunction of said court. It appears from the record that in an action brought in the Hamilton Circuit Court by Mendenhall and Denny, residents and consumers of natural gas in the town of Westfield, on behalf of themselves and all other gas consumers of said town, against the Westfield Gas and Milling Company, a final decree was entered in June, 1894, perpetually enjoining said gas company, its assignees, grantees, and successors, from taking, charging, demanding, or collecting more than eighty cents per month for the use of natural gas in cook or kitchen

Thistlethwaite et al. v. The State.

stoves in said town, the same being the maximum rate fixed by section seven of an ordinance of said town passed January 4, 1889, and from raising or increasing the monthly or yearly charges for such stoves above eighty cents per month, the maximum rate as aforesaid. From this decree an appeal was prosecuted by said gas company to this court, and the said judgment was on November 19, 1895, affirmed. *Westfield Gas and Milling Co. v. Mendenhall*, 142 Ind. 538. While said appeal was pending in this court the Westfield Gas and Milling Company and the town of Westfield, for the purpose of compromising all questions in said injunction proceedings, entered into an agreement which provided that the town of Westfield was to pass a new ordinance regulating the price for which gas should be furnished in said town, increasing the maximum price for cook stoves to \$1.25 per month, and also that one-half of the costs in the injunction suit pending on appeal in this court should be paid by said gas company, and the other one-half by the citizens of said town. Afterwards, in accordance with the terms of said agreement, the board of trustees of said town, on November 1, 1895, passed an ordinance fixing the maximum rates to be charged by the Westfield Gas and Milling Company to consumers in said town, for the period of eleven months from November 1, 1895. The enacting clause of said ordinance was as follows: "Be it enacted by the trustees of the town of Westfield, that so much of section seven of an ordinance passed and dated January 4, 1889, regulating the prices to be charged for the use of natural gas for heating and illuminating purposes by the Westfield Gas and Milling Company shall be amended, and the following prices substituted for a period of eleven months from November 1, 1895."

The body of the act provided what the rates should

be per month from "November 1st, 1895, until May 1st, 1896," and what the rates should be from "May 1st, 1896, until October 1st, 1896," thus in express terms, fixing the rates only for eleven months.

Said gas company, after the passage of said ordinance, charged and collected from consumers of natural gas the maximum rates fixed by said ordinance, until February 8, 1896.

In February, 1896, one of the appellants, the Westfield Gas Company, succeeded by purchase to the rights and franchises of said Westfield Gas and Milling Company, and said appellants, from that date until the commencement of this action, in December, 1896, with a full knowledge of said injunction, demanded and received rates for gas in excess of the rates fixed by section seven of said ordinance and by said injunction.

On October 1st, 1896, the eleven months fixed by said ordinance, during which the increased rates could be charged, expired, and negotiations were opened between the board of trustees of said town and the Westfield Gas Company, relative to the rates to be charged for gas by the said company in the future. That as a result of said negotiations, a resolution in writing was passed by the board of trustees of said town in these words: "Resolved, that the Westfield Gas Company be and hereby is authorized to charge and collect from consumers of natural gas in the town of Westfield, for the month of October, 1896, the same rates fixed in the ordinance of November 1, 1895, amending for eleven months, section seven of the ordinance of January 4, 1889."

And it was further agreed that if said company would drill wells and make provision to furnish an adequate supply of gas to its consumers in said town, said ordinance of November 1, 1895, should be contin-

Thistlethwaite et al. v. The State.

ued in effect. That the Westfield Gas Company afterward completed a number of wells and fully complied with said agreement, but no ordinance was passed by said town as provided in said agreement.

It is not claimed by appellants that said last oral agreement made between the Westfield Gas Company and said board of trustees on October 1, 1896, for the continuation of the increased rates of gas, was binding on the town. It is clear that the board of trustees had no power to make such a contract.

Appellants insist that the ordinance passed November 1, 1895, increasing the maximum rates to be charged for the use of natural gas for eleven months from that date, entirely abrogated section seven of the original ordinance, as passed January 4, 1889, and that after the expiration of said eleven months, if said limitation was valid, there was no restriction upon the rates to be charged for the use of natural gas, but, if said limitation of eleven months was void, the maximum rates to be charged were those fixed by said ordinance adopted November 1, 1895.

It will be observed that the ordinance of November 1, 1895, only provided the rate to be charged by the Westfield Gas and Milling Company, while section seven of the original ordinance fixed the rates to be charged by all corporations and persons furnishing natural gas to consumers in the town of Westfield.

It is clear, we think, from the language of the ordinance passed November 1, 1895, that the board of trustees did not intend to repeal section seven of the ordinance of January 4, 1889. The clause "for the period of eleven months," and the word "substitute," in the enacting clause of said ordinance, qualifies the word "amend;" and it is evident that it was the intention of the town board that the price named in said ordinance should affect only said gas company, and

control only from November 1, 1895, to October, 1896, a period of eleven months, and that from and after that day the rates fixed by section seven of the original ordinance should control.

The resolution adopted by the board of trustees on October 1, 1896, expressly declares that "The same rate fixed by the ordinance of November 1, 1895, amending for eleven months section seven of the ordinance of January 4, 1889," thus clearly showing that said ordinance of November 1, 1895, was not understood or intended to amend section seven of the ordinance of 1889, in the ordinary sense of that word, but only to provide a temporary schedule of rates for the period named.

Appellee contends, however, that the contract between the Westfield Gas and Milling Company and the town of Westfield, compromising all questions involved in said injunction suit, was illegal and void, for the reason that the town of Westfield was not a party to the said injunction suit, and had no power to compromise the case, much less to agree that the citizens of the town should pay one-half of the costs; and that the ordinance of November 1, 1895, increasing the maximum prices for natural gas, passed in pursuance of said agreement, was also void; and that said ordinance was void for the further reason that the same was not a general ordinance, fixing the price of gas generally, but only the prices to be charged by the Westfield Gas and Milling Company.

It is probably true as claimed by appellee, that the board of trustees had no power to compromise said injunction case or to agree to pay any part of the costs thereof, or that the citizens of the town should pay any part thereof, and that such contract was invalid; but it is not necessary to decide whether or not said ordinance was void for the reasons urged by the ap-

Thistlethwaite et al. v. The State.

pellee, because, even if said ordinance was valid, it only continued in force until October 1, 1896, and even if continued until November 1, 1896, by the resolution adopted October 1, 1896, the same was not in force during the month of November, 1896, during which time it is admitted that appellants charged and collected rates for cook stoves in excess of eighty cents per month, which was prohibited by said injunction. It is evident that appellants violated the said injunction during the month of November, 1896, if not before.

Appellants, in their answer to the rule to show cause, alleged "that, all and singular, the acts charged against them were done in perfect good faith, and in full reliance upon said agreement and ordinance and resolution, believing that said Westfield Gas Company had a right to act thereunder as it did; and the same was done without any intention to violate any order, or to be in contempt of said court."

Appellants insist that this proceeding is under section two of the act of 1879, being section 1019, Burns' R. S. 1894 (1007, Horner's R. S. 1897), and that they were entitled to be discharged upon said answer under the provisions of section 9 of said act, being section 1025, Burns' R. S. 1894 (1013, Horner's R. S. 1897).

This, however, is a proceeding against appellants for contempt, to enforce a civil right and remedy; and it is expressly provided by section 10 of said act, as amended (Acts 1881, p. 10), being section 1026, Burns' R. S. 1894 (1014, Horner's R. S. 1897), that said act does not apply to proceedings of this kind.

The Hamilton Circuit Court had the inherent power to punish appellants for contempt for violating said injunction. In such proceeding appellants could not purge themselves by alleging in their answer that they acted in good faith, and without any intention of violating said order of the court. The rights of the

Thistlethwaite *et al.* v. The State.

parties who obtained said injunction cannot be defeated in this way. Whether or not appellants were guilty of contempt did not depend on their intention, but upon the acts done by them. *Hawkins v. State*, 126 Ind. 294; *Dodge v. State*, 140 Ind. 284, 288; *Thompson v. Pennsylvania R. R. Co.*, 48 N. J. Eq. 105, 21 Atl. 182, and cases cited; *Wilcox Silver Plate Co. v. Schimmel*, 59 Mich. 524, 26 N. W. 692, and cases cited; *Cartwright's Case*, 114 Mass. 230, 238-240; *Snowman v. Harford*, 57 Me. 397; *Hawley v. Bennett*, 4 Paige Ch. 163; *People v. Compton*, 1 Duer (N. Y.) 512; *Buf-fum's Case*, 13 N. H. 14; *State v. Matthews*, 37 N. H. 450; *Watson v. Citizens Savings Bank*, 5 S. C. 159; *Huntington v. McMahon*, 48 Conn. 174, 200, 201; *Hughes v. People*, 5 Colo. 436; *Wells, Fargo & Co. v. Oregon, etc., R. W. and Nav. Co.*, 19 Fed. 20; *Wartman v. Wartman*, Taney's Dec. (U. S.) 362; 4 Ency. Pl. and Prac. 791.

In *Wilcox Silver Plate Co. v. Schimmel*, *supra*, it is said: "They were bound to obey the injunction, and they disobeyed it at their peril. Neither their belief, motive, or intent with which the writ is disobeyed in any manner varies the responsibility of the party who violates it; on the contrary, they are liable for its violation in whatever capacity or from whatever motives they may have acted."

Finding no error in the record, the judgment is affirmed.

 Miller et al. v. Dill et al.

MILLER ET AL. v. DILL ET AL.

[No. 17,940. Filed January 28, 1898.]

149	326
151	661

149	326
157	431

149	326
165	12

149	326
167	393

167	621
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EVIDENCE.—*Action to Cancel Note.—Cross-Examination.—Forgery.*

—In an action to cancel a note on the ground that the same was forged, it was improper to ask a party plaintiff, on cross-examination, whether he had not heard his co-plaintiff make statements affecting the chastity of defendant, on the theory that the note in suit was executed by said plaintiff in compromise of a contemplated slander suit based upon such statement, where the examination in chief had not involved any inquiry as to said statement. *p. 328.*

SAME.—*Action to Cancel Note.—Forgery.*—In the trial of an action brought to cancel a note on the ground of forgery, it is improper to show that plaintiff conveyed property held by him at the time of the alleged execution of the note, on the theory that plaintiff executed same to compromise and avoid a slander suit, and conveyed his property for the purpose of defeating the collection of the note, as there can be no inference from the mere conveyance of property that the grantor is a debtor. *pp. 329, 330.*

SAME.—*Action to Cancel Note.—Forgery.*—In a suit to cancel a note on the ground of forgery, evidence offered to the effect that plaintiff and witness had talked about the note several times, and plaintiff had never denied its execution was properly rejected, where there was nothing in the evidence disclosing the character of such conversation from which it could be ascertained whether any reason existed for the denial of the execution thereof. *pp. 330, 331.*

SAME.—*Expert Witness.—Forgery.*—No error is committed in refusing to permit an expert witness to testify that a forger, in disguising and imitating handwritings, is more particular at the beginning than at the closing of such effort. *p. 331.*

SAME.—*Exception to Admission Of.—Objections Must be Specific.*—Objections made to the admission of evidence must be specific, objections made on the ground that the evidence is irrelevant, incompetent, and immaterial present no question for review. *pp. 331, 332.*

SAME.—*Action to Cancel Note as a Forgery.—Slander.*—Where in the trial of an action to cancel a note as a forgery, defendant introduced evidence to the effect that plaintiff had uttered a slander against defendant by stating, in effect, that she was pregnant, and that when threatened with a suit for such slander, he had executed the note in suit and delivered it to her as genuine in settlement of her supposed damages, evidence going to show that at the time the alleged slander was uttered, defendant was in fact pregnant, was properly admitted for the purpose of determining the influences inducing plaintiff to execute the note. *pp. 332, 333.*

Miller et al. v. Dill et al.

TRIAL.—Examination of Witness.—It will not be presumed that the trial court permitted an improper examination to continue, over objections sustained by it until it was itself prejudiced in favor of the examining party. *p. 334.*

EVIDENCE.—Expert Witness.—Action to Cancel Note.—Forgery.—No error was committed in the trial of an action to cancel a note as a forgery in permitting witnesses to testify to the genuineness of plaintiff's signature to bank checks, which were not papers in the case and not admitted to be genuine, where no comparisons were made, and where the signatures so proved were rejected as evidence. *pp. 334, 335.*

TRIAL.—Introduction of Evidence out of Regular Order.—Discretion of Court.—The introduction of evidence out of its regular order is within the sound discretion of the trial court, and, unless made to appear as an abuse of discretion, is not error. *p. 335.*

EVIDENCE.—Action to Cancel Note.—Forgery.—In an action to cancel a note alleged to have been forged, evidence that defendant sold to witness a forged note and afterward went to the office of witness disguised and offered to sell him the note in suit was competent as a link in the chain of circumstances tending to show defendant's guilty knowledge of the forgery of the note. *p. 335, 336.*

SAME.—Weight Of.—The Supreme Court cannot weigh and pass upon conflicts in the evidence, and if the evidence most favorable to the decision of the trial court, standing alone, is sufficient, the judgment must be upheld. *p. 336.*

SAME.—Action to Cancel Note.—Forgery.—Sufficiency of Evidence to Sustain Judgment.—In an action to cancel a note on the ground that same was forged, evidence that the blank upon which the note was written was printed almost two years after the alleged execution of the note was sufficient of itself to sustain a judgment canceling such note. *pp. 336, 337.*

COSTS.—Consolidation of Causes of Action.—Apportionment of Costs.—Where two causes were pending in which the evidence would be substantially the same, and by order of court the trial and proceedings were had in one cause, the finding therein to control the other cause, it will be presumed that the order of court was followed, and that no costs were made in the cause which was not tried, and the judgment of the trial court overruling a motion to apportion the costs between the two causes will be sustained. *p. 337.*

From the Tippecanoe Circuit Court. *Affirmed.*

George P. Haywood, Charles A. Burnett and R. P. DeHart, for appellants.

R. P. Davidson and D. E. Storms, for appellees.

Miller et al. v. Dill et al.

HACKNEY, J.—In the lower court two suits were instituted by the appellees, Edwin S. Dill and Calvin Dill; one against the appellant, Anna Collins, and one against the said Anna Collins and the appellant, Henry A. Miller. In each suit it was sought to cancel, as a forgery, a note, in the one suit for \$500.00, claimed to have been made to and held by said Anna Collins; and in the other suit for \$600.00, claimed to have been made to said Anna Collins, and by her transferred to said Miller. The two suits were consolidated, and tried together upon the issues of general denial of the complaints, counterclaims seeking to recover upon the notes, and answers to the counterclaim in sworn denials of the execution of the notes. The questions for decision arise upon the motion for a new trial and a motion for the apportionment of costs.

The first question presented upon the motion for a new trial relates to the sustaining of appellees' objection to this question, asked of Calvin Dill upon cross-examination: "Isn't it a fact, Mr. Dill, that you yourself have heard Ed. say things affecting the chastity of Anna Collins during that summer?"

The relevancy of the question is urged upon the theory of the appellants that in the summer of 1891 the appellee Edwin S. Dill had been threatened by Anna Collins with a suit for slander, claimed to have been uttered by him in certain reflections upon her character for chastity, which threatened suit had been compromised by him by the execution of the notes in suit, said Calvin Dill executing them as surety for Edwin. The objection to the question, however, was that it was not a proper cross-examination, and this, we have no doubt, was correct. The examination in chief had not involved any inquiry as to the statements of Edwin concerning her character, nor as to any knowledge of the witness that her character had been questioned by Edwin.

In the cross-examination of Edwin S. Dill the court excluded questions as to whether he had not, prior to the time of the alleged execution of the notes, made certain statements of a slanderous character concerning Anna Collins, to persons named. The witness had, in chief, only testified in denial of the execution of the notes and of his knowledge of their existence. . He had not gone into the question of the consideration of the notes, and had not mentioned any of the slanders involved in the theory of the appellants. There was no possible foundation for the attempted cross-examination, and the court's ruling was proper.

Questions were asked upon the cross-examination of Calvin and of Edwin S. Dill as to when it was that Anna Collins and Harry Dill, a son of Calvin, "had some difficulty * * * with reference to a breach of promise suit." The court excluded the questions as not pertinent to the examination in chief, and we think no error was committed thereby. It is further insisted, however, that the inquiry was proper to show an ill feeling between the Dills and Anna Collins. It is not claimed that it had theretofore been inquired as to the state of feeling between them, and without this it cannot be proper to examine into the character of a difficulty claimed to have generated an ill feeling.

On the cross-examination of Edwin S. Dill it was asked if he then owned property, and if he had not conveyed property, held by him at the time of the alleged execution of the notes; to which questions the court sustained appellees' objections. It is claimed that these questions would have elicited the information that the witness had conveyed property held by him at the time of the alleged execution of the notes, and that he had no property at the time of the examination. The inferences sought to be drawn were that the conveyance was fraudulent, having been intended

Miller et al. v. Dill et al.

to defeat these notes, and therefore an act inconsistent with the evidence of the witness that he had not executed the notes, and had no knowledge of their existence. Whatever the legitimate inference from a fraudulent or voluntary conveyance, there can be no inference from the mere conveyance of one's property that he is a debtor, or that he does so to defeat a claim the validity of which he denies. Nor is it true that the examination was proper upon the theory that one liable in slander is subject to evidence of his financial condition. This was not a suit for slander, and if it were, the inquiry, as a matter of cross-examination, would require some basis from the examination in chief, which is wholly absent here.

A witness for the appellants had testified that Edwin S. Dill, in the summer of 1891, repeated to the witness a statement which he claimed to have made to another concerning Anna Collins, which statement, if untrue, was slanderous. The witness was then asked if he had ever heard the statement before, and he answered that he had not, but the answer was stricken out by the court without an exception by the appellants. He was then asked if before that occasion he had heard talk of her condition, to which question the court sustained an objection. There was no error in the ruling. Whether that was or was not the first expression of the alleged slander which came to the witness would not aggravate the slander, and appellants were not to be benefited by mitigating it.

It was asked of a witness for the appellants if Edwin S. Dill at any place or time denied the execution of the notes. The court sustained the objection of the appellees, and appellants offered to prove that the witness and Dill had several times conversed about the notes, and that the latter had not denied their execution. Upon the rule that silence, when one is re-

quired to speak, is admissible in evidence, the appellants insist that the offered evidence should not have been excluded. Nothing in the evidence of the witness disclosed the character or extent of the conversation concerning the notes, and, if the rule urged were applicable in this kind of a case, we are in possession of no facts disclosing the importance or the necessity for Dill to deny the execution of the notes. The duty rested upon the appellants to disclose circumstances which required Dill to speak before his failure could become proper evidence.

Complaint is made that an expert was not permitted to testify that a forger, in disguising and imitating handwritings, is more particular at the beginning than at the closing of the effort. The question seems not to have been within the domain of expert testimony. It presented no question of science, and involved no rule not subject to as many variations as there might be efforts at forging. The care of one man is not evidence of the care which may be exercised by another in an effort to commit a forgery, any more than is the skill of one man, in executing the imitation or disguise, evidence of the skill of another.

In numerous instances evidence was admitted, in rebuttal, over the objections of the appellants, which evidence the appellants, in their brief, have classified as "(1) Rumors and general rumors affecting the chastity of Anna Collins; (2) her general reputation for chastity in the neighborhood where she lived in 1891; (3) evidence pretending to be of an expert character, with reference to her physical appearance, and opinions of witnesses as to whether or not she was pregnant in the summer of 1891."

As to the first class, the inquiry, as far as our attention has been directed to the evidence, was not as to rumors simply, but was as to general rumors in the summer of 1891, to the effect that she was pregnant.

Miller et al. v. Dill et al.

As to the second class, there was no instance in which specific objections were made to the evidence, the only objections being that the evidence was "irrelevant, incompetent, and immaterial," and, as often decided, raised no question.

The third class, as given by the appellants, it will be observed, related to the physical appearance of Anna Collins, and to the opinions of witnesses that in the summer of 1891 she was pregnant. If evidence that she was pregnant was admissible, it cannot be seriously maintained that the descriptions of her physical appearance was a subject for expert testimony.

These classes of evidence resolve themselves into this inquiry: Was the fact that she was pregnant at the time of the alleged slander admissible? Was her appearance, as an indication of a condition of pregnancy, competent? And was the existence, at the time of the alleged slander, of general rumors in her neighborhood, to the effect that she was pregnant, admissible?

Counsel for the appellants attack the rulings of the trial court, in admitting the evidence, upon the ground that it was admitted "to smirch the character of Miss Collins," and that when her character was not in issue. The pleadings did not put her character in issue, nor was the question of slander, introduced by the appellants, expressly in issue by the pleadings.

In favor of the genuineness of the notes, the appellants offered evidence, for the first time, that the appellee Edwin S. Dill had uttered a slander against Anna Collins by stating, in effect, that she was pregnant, and that, when threatened with a suit for such slander, he had executed the notes, and delivered them to her as genuine, in settlement of her supposed damages. Such evidence was of a corroborative character,

as tending to supply a consideration for the notes, and to support Anna Collins in her testimony that they came from Edwin S. Dill as genuine. Thus the motive or inducement of Edwin S. Dill to execute the notes was made, by the appellants, an important factor in support of their genuineness. It certainly cannot be seriously contended that evidence of the absence of such motive or inducement was not admissible in rebuttal of the evidence of the appellants. That she was in fact pregnant at the time of the alleged slander, while not conclusive that Edwin did not execute the notes, was evidence that there had been no slander, for the truth of the words spoken disproves the slander. That her appearance, as to increasing in size locally, and her statements that she was pregnant, and that she had missed her menses for some months, was proper evidence, though not conclusive, that she was pregnant, cannot be doubted.

The appearance of pregnancy, and the fact of pregnancy, at the time of the alleged slander, if proper to be considered in determining the influences inducing Edwin S. Dill to give or not to give notes for \$1,100.00, it would seem proper also, for the same purpose, to consider the existence at the same time of a general rumor in the neighborhood where she resided that she was pregnant. While it may be true that in a suit for the slander such a rumor would have been admissible only in mitigation of damages, and not in proof or justification of the slander, that conclusion is not at variance with the holding that such general rumor was a proper element in the circumstances affecting the judgment of Edwin S. Dill, or as aiding to break the force, in his mind, of a liability so great that he must execute notes for \$1,100.00 in settlement of such liability. When it is borne in mind that the appellants introduced the element of slander into the case to

Miller et al. v. Dill et al.

show a moving inducement to Dill to execute the notes, it seems to have been proper for Dill to rebut the existence of such an inducement, and to show that she was entitled to no damages, or as little damage as possible.

Complaint is also made of the conduct of counsel for the appellees, while conducting the cross-examination of Anna Collins, in continuing to ask questions as to specific acts of dishonesty or immorality subsequent to the alleged slander, which acts the court had, from the beginning, ruled not to be proper subject of cross-examination.

In *Randall v. State*, 132 Ind. 539, it was held that persistence in such a course might, when it is carried to the extent of prejudicing the jury, be cause for a new trial. In any case the trial court, having the witness before it, and enabled to observe the effects of the examination, both as to the witness and as to the jury, is better able to judge of the abuse than this court can ever be; and no doubt that court should interfere in time to prevent injustice. This case was tried without a jury, and we will not presume that the court permitted an improper examination to continue, over objections sustained by it, until it was itself prejudiced in favor of the examining party. The experience of the trial judge is that, where such persistence has any influence, it tends to prejudice his mind against the party thus abusing the privileges of the occasion.

It is urged that the court erred in permitting two of the witnesses for the appellee to testify to the genuineness of the signature of Edwin S. Dill to a series of eight bank checks, not papers in the case, and not admitted to be genuine; and to compare them with the signatures in dispute. Out of the protracted examination of these witnesses, concerning the checks, there

was but one exception saved, and that was as to a question whether the signature of said Dill to a check was genuine. The two witnesses mentioned made no comparisons of signatures to which attention has been directed, and the signatures so proved were rejected as evidence upon the objection of the appellants. Proof of the genuineness of the signatures, if not the foundation for comparisons as appellants contend, was harmless.

Complaint is made that the court permitted the appellees to introduce evidence tending to establish the forgery of the notes, out of its regular order. Such practice is always within the sound discretion of the trial court, and, unless made to appear as an abuse of discretion, is not error. Appellants do not show that they were harmed by the action of the court.

There was evidence that the note for \$500.00 was offered, at a discount, to John D. Gougar by the appellant Anna Collins; that at the time she did so she was disguised with spectacles and a heavy veil; that he held the offer under advisement until a time when she was to return; that when she did return, as understood, Gougar had had Calvin Dill to be at his (Gougar's) office, and, as Miss Collins was upon the stairway leading to said office, she saw said Dill above her, and immediately retraced her steps and hastened into the street. The retreat from Dill tended to show guilty knowledge as to his interests, and the disguise tended to show guilty purpose as to the proposed transaction with Gougar. An additional circumstance added much strength to the guilty purpose to impose upon Gougar, and that was that a short time previous she had sold to him a forged note upon another, which note named a fictitious payee, and she had indorsed it in that name. This latter note was admitted in evidence over the objection and exception of the appellants, and the question is now made that it was inad-

Miller et al. v. Dill et al.

missible because it had no other tendency than to show the commission of another and distinct offense. While not lending sanction to the inference that it was not competent as relevant to the primary question, the forgery of the notes of the Dills, we think it was competent as a link in the chain of circumstances disclosing her guilty knowledge in attempting to put the Dill note off to Gougar. It aided in explaining her coming to Gougar disguised. Her first transaction with him was connected with the second by the necessity it gave to conceal her identity and to hide the method of putting off on the same person the two promissory notes made to fictitious payees. Guilty knowledge as to the Dill note was of first importance, and the suspicious circumstances attending her two visits to Gougar concerning that note, with whatever collateral circumstances tending to throw light upon such suspicious circumstances, were competent. It must be conceded that she could have offered the former transaction, with the fact that it was a fraud upon Gougar, to explain the purpose in concealing her identity in the second. The connection of the two transactions would then become clear. That the evidence comes from the other side does not break the connection.

The sufficiency of the evidence to sustain the finding of the court has been questioned, and the discussion has been upon the theory that this court would weigh and pass upon the conflicts in the evidence.

This court, in considering the evidence, can only look to that most favorable to the decision of the trial court, and if that, standing alone, is sufficient, the judgment must be upheld. In this view of our duty it is necessary to consider but one line of the great mass of evidence in the record. It was the theory of the appellants that the notes were executed in the summer of 1891, and that date seems necessary to consist with

the existence of the consideration claimed for the notes, the settlement at that time of an alleged slander. That theory was utterly destroyed, if we must believe one line of evidence for the appellees, by proof that the blanks upon which the notes were written were not printed until May, 1893. Upon this evidence alone we would be required to affirm the judgment, so far as it needs support from the evidence.

We do not pass upon all of the many questions discussed by the learned counsel for the appellants, for various reasons. Sometimes questions are urged where no exceptions were reserved; sometimes where no reference is made to the evidence questioned; sometimes where objections to evidence were general, and raised no specific question; and sometimes they were without such discussion as to indicate that they were deemed meritorious.

A general motion was made in the trial court to apportion the costs between the two cases, after consolidation, which motion was overruled. The order of the court, which was manifestly of advantage to all of the parties, was that the further proceedings be had under cause numbered 6,309, the cause in which Collins and Miller were joint defendants.

It is clear, as it must have been when the order was made, that the evidence in either case must be substantially the same as in the other, and the effect of the order was that the trial should be had in number 6,309, and that the finding therein should control the other cause. It is presumed that the order made was followed, and that none of the costs of the trial were made in cause numbered 6,425. The propriety of the order is not questioned by the appellants.

The court did not err in overruling the motion.

The judgment is affirmed.

 Funk v. The State.

FUNK v. THE STATE.

[No. 18,375. Filed January 28, 1896.]

CRIMINAL LAW.—*Charge Must be Preferred with Certainty.*—In a criminal prosecution the particular crime with which the accused is charged must be preferred with such reasonable certainty by the essential averments in the pleading as will enable the court and jury to understand distinctly what is to be tried and determined, and fully inform the defendant of the particular charge he is required to meet. *p. 340.*

FALSE PRETENSES.—*Sufficiency of Affidavit and Information.*—It is an indispensable requisite to the validity of an affidavit and information charging one with obtaining money by means of false pretenses, that there should be an absolute and direct negative of the material pretenses upon which the State bases the charge, and which it expects to prove and rely upon for a conviction. *p. 343.*

From the Allen Circuit Court. *Reversed.*

S. M. Hench and E. V. Harris, for appellant.
Newton D. Doughman, for State.

JORDAN, J.—Appellant was prosecuted on affidavit and information for the crime of having obtained a certain sum of money by means of false representations in violation of the provisions of the statute. Section 2352, Burns' R. S. 1894 (2204, Horner's R. S. 1897). Upon a trial he was convicted, and sentenced to be imprisoned in the state prison, and to pay a fine of twenty-five dollars. Motions to quash both the affidavit and information were made and overruled, and proper exceptions reserved. These rulings of the court, and the overruling of a motion for a new trial, are assigned as errors.

The sufficiency of the affidavit and information are each assailed by counsel for appellant for several specified reasons, all of which we need not set out in detail. The information and the affidavit upon which it is founded are substantially alike, the latter being in words as follows (Caption omitted): "William D.

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169	246
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Funk v. The State.

Bakér, being duly sworn, upon his oath says, that on the 2nd day of December, A. D. 1896, at the county of Allen, and State of Indiana, one Mathias Funk did then and there unlawfully, feloniously and designedly, with intent to cheat and defraud one William D. Baker, falsely pretend to the said William D. Baker that he, the said Mathias Funk, was then and there the owner of two iron gray mares then in said county, of the value of two hundred dollars (\$200.00), in his own name and right, and free from any incumbrance, claim, and lien; that by means of said false pretenses, the said William D. Baker then and there relying upon and believing the same to be true, said Mathias Funk did then and there unlawfully, feloniously, and designedly obtain from said William D. Baker sixty dollars (\$60.00) money of the United States, current therein, of the value of sixty dollars (\$60.00), the property of the said William D. Baker, in exchange for two promissory notes of said Mathias Funk, one for thirty dollars (\$30.00) and the other for thirty dollars and eighty-one cents (\$30.81); said notes being dated on the 2nd day of December, 1896, and payable in sixty and ninety days, respectively, and, as security for said notes, a mortgage was executed by said Mathias Funk upon the said horses hereinbefore described; that the said notes and mortgage were then and there delivered to said William D. Baker by said Mathias Funk in exchange for the said sixty dollars (\$60.00), which was then and there delivered by the said William D. Baker to said Mathias Funk, and the said William D. Baker then and there relied upon said false representations and pretenses of said Mathias Funk; that he was then and there the owner in his own right of the said horses described in the said mortgage, as security for said notes, whereas in truth and in fact the said Mathias Funk was not then and

Funk v. The State.

there the owner of said horses, and had no right, title, or interest in them whatever, but did then and there falsely pretend that he was the owner of the same, as aforesaid, with the felonious intent then and there to cheat and defraud the said William D. Baker out of the said sum of sixty dollars (\$60.00), as aforesaid; contrary to the form of the statutes of the State of Indiana." Signed and sworn to by William D. Baker.

An inspection of this pleading fully discloses that it is not framed with the strictness that is generally required in a criminal charge, and that the accusation against the defendant is not preferred in all of the essential averments with the reasonable certainty which the law exacts from the State in a criminal prosecution. The doctrine so frequently asserted and adhered to by this court is that the particular crime with which the accused is charged must be preferred with such reasonable certainty by the essential averments in the pleading as will enable the court and jury to distinctly understand what is to be tried and determined, and fully inform the defendant of the particular charge which he is required to meet. The averments must be so clear and distinct that there may be no difficulty in determining what evidence is admissible thereunder. *Keller v. State*, 51 Ind. 111; *Strader v. State*, 92 Ind. 376; *State v. Cleveland, etc., R. W. Co.*, 137 Ind. 75; *Littell v. State*, 133 Ind. 577.

It was asserted in the case last cited that, where an indictment is so uncertain or doubtful as to be susceptible of more than one construction, in that event it must be construed most strongly against the State, and all reasonable doubts arising upon the averments thereof should be solved in favor of the person accused. Tested by these principles, it is apparent that the pleading in controversy is insufficient.

In the beginning it is charged that the accused

Funk v. The State.

falsely pretended that he was the owner of "two iron gray mares, then in said county, of the value of two hundred dollars, in his own name and right, and free from any incumbrance, claim, and lien; that by means of said false pretense the said William D. Baker then and there relying upon and believing the same to be true, said Mathias Funk did then and there unlawfully, etc., obtain from said Baker sixty dollars, etc., * * * in exchange for two promissory notes of said Mathias Funk, one for \$30.00 and the other for \$30.81; said notes being dated on the 2d day of December, 1896, and payable in sixty and ninety days respectively; and, as security for said notes, a mortgage was executed by said Mathias Funk on the said horses hereinbefore described." The delivery of the notes and mortgage to Baker by the defendant in exchange for the sixty dollars is then averred, and the delivery of the money by Baker to the defendant is also alleged. It is then stated that Baker relied on the said false pretenses of the defendant that he was "the owner in his own right of the said horses described in said mortgage as a security for said notes, whereas in truth said Funk was not the owner of said horses and had no right, title and interest in them whatever." We may conjecture what the affiant had in his mind when he made the affidavit, but that is not sufficient to uphold a criminal pleading. Possibly it was intended to establish that the defendant obtained the money from Baker as a loan on the faith and reliance that the former was the owner, as represented, of the two iron gray mares, unincumbered, and of the value of two hundred dollars, and that this property was offered and pledged by a mortgage executed by the defendant to Baker as security for the money obtained; but that such was the transaction is left to be inferred. The averments do not disclose whether the money was

Funk v. The State.

obtained by the means of the false pretenses as the result of negotiations for a loan, or as an exchange for the two notes and mortgage. The connection between the false pretenses and the obtaining of the money certainly is not shown. There are no averments to show that either the notes or mortgage received in exchange for the money were executed to Baker, or any other person. In respect to this fact all is impressed with doubt and uncertainty, and, under the circumstances, the accused would not be apprised or informed as to the particular notes and mortgage intended; and certainly upon a trial a serious difficulty would arise in determining what notes and mortgage were admissible in evidence. It will be observed that it is first charged that the defendant falsely represented that he was the owner of the two iron gray mares of the value of two hundred dollars, etc., and that reliance was placed by Baker upon the said representations in the belief that they were true. In the closing part of the affidavit it is alleged that Baker relied on the false representations that the defendant was the "owner of the said horses described in the mortgage as a security for said notes, whereas in truth and in fact said Mathias Funk was not the owner of said horses." It is not alleged that the money was delivered to the defendant by the means of the false representations as to the ownership and value of the horses described in the mortgage, and as to what the description of the horses in the mortgage may be is a matter of surmise or conjecture. The pleader, in his attempt to negative the false pretenses, seems to have shifted the reliance imposed by Baker on the pretenses of ownership of the two iron gray mares of the value of two hundred dollars, as first averred, to the representation of the defendant that he was the owner of horses described as a security in the

Funk v. The State.

mortgage. But as to how the horses were described, as to whether they were iron gray mares of the value of two hundred dollars, etc., as heretofore said, is matter of surmise and conjecture. We think it must be evident that this is not a sufficient negative of the false pretenses by the means of which the defendant is alleged to have obtained the money.

It is an indispensable requisite to the validity of an indictment, information, or affidavit for obtaining money or other property by the means of false pretenses, that there should be an absolute and direct negative of the particular pretenses by which the money or property was obtained, and thereby show that they were false. This requisite is at least essential as to all the material pretenses upon which the State bases the charge, and which it expects to prove and rely upon for a conviction. See *Pattee v. State*, 109 Ind. 545; *Johnson v. State*, 75 Ind. 553; *Todd v. State*, 31 Ind. 514; *Redmond v. State*, 35 Ohio St. 81; *State v. Bradley*, 68 Mo. 140; *State v. DeLay*, 93 Mo. 98, 5 S. W. 607; *People v. Stone*, 9 Wend. 180; *People v. Gates*, 13 Wend. 311; *Tyler v. State*, 21 Tenn. 37; *Amos v. State*, 29 Tenn. 117.

In support of the conclusion reached as to the insufficiency of the pleading, see the following additional cases: *Johnson v. State*, 11 Ind. 481; *State v. Orvis*, 13 Ind. 569; *State v. Locke*, 35 Ind. 419; *Jones v. State*, 50 Ind. 473; *Cooke v. State*, 83 Ind. 402; *State v. Williams*, 103 Ind. 235; *State v. Conner*, 110 Ind. 469.

The affidavit is ambiguous and uncertain in its averments and negations, and it follows that the court erred in overruling the motions to quash it and the information, for which error the judgment is reversed, and the cause ordered remanded to the lower court, with instructions to sustain said motions. The clerk

The New York, etc., R. R. Co, v. The Hamlet Hay Co.

of this court is directed to issue the proper warrant for the return of the prisoner to the sheriff of Allen county.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD
COMPANY v. THE HAMLET HAY COMPANY.

[No. 18,026. Filed Oct. 26, 1897. Rehearing denied Jan. 28, 1898.]

RAILROADS.—Construction of Bridges and Embankments.—Statute Construed.—By clause 5 of section 5153, Burns' R. S. 1894, a railroad company is empowered to construct its road across a water course so as not to interfere with the free use of the same, and "in such a manner as to afford security for life and property;" and provides that the railroad company shall restore the watercourse "to its former state, or in a sufficient manner not to impair unnecessarily its usefulness or injure its franchises." *Held*, that the "life and property" and the "franchises" referred to in the statute are not those of the railroad corporation, but those connected with the watercourse. *pp.* 346, 347.

SAME.—Bridges and Embankments.—Surface Water.—Water which flows down a stream in high-water channels, having well-defined beds and banks, is not surface water against which a railroad company, in the construction of its road, has a right to build embankments. *pp.* 347, 348.

SAME.—Liable to Landowner for Damages Caused by Obstructing Water Course.—Where a railroad company constructs bridge embankments, and thereby obstructs a natural watercourse, the company is liable in damages resulting to a landowner; and the fact that the embankments were built in a careful manner, so as to protect the charter right of the company is no defense. *p.* 348.

SAME.—Construction of Bridge and Embankments.—It is the duty of a railroad company in the construction of bridges and embankments to provide for unusual stages of water. *p.* 349.

SAME.—Damages for Obstructing Water Course.—When Action Accrues.—A landowner's right of action against a railroad company for damages caused by the obstruction of a natural watercourse accrued at the time the landowner was damaged by the overflow of water. *pp.* 349, 350.

APPEAL AND ERROR.—Interrogatories to Jury.—New Trial.—Alleged errors in submitting to the jury certain interrogatories, and in refusing to require more specific answers to others, to be available on appeal must be assigned as reasons for a new trial. *p.* 350.

SAME.—Instructions.—Where it is not shown that the instructions set

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The New York, etc., R. R. Co. v. The Hamlet Hay Co.

out in the record were all the instructions given, error cannot be predicated on a refusal to give certain instructions requested. *p. 352.*
SAME.—*Excessive Judgment.*—An exception that the judgment is excessive, it being admitted that a judgment for some amount was proper, will not be considered on appeal, unless a motion to modify was made in the trial court. *pp. 353, 354.*
SAME.—*Special Verdict.*—*Modification of Judgment.*—*Review.*—Where a special verdict is returned, and in answer to one interrogatory damages are assessed, and in answer to another the interest thereon is found, any error in the amount of interest is an error of law to be corrected by the court by a modification of the judgment, and could not be reviewed in passing on the action of the court in overruling the motion for a new trial. *p. 354.*

From the Marshall Circuit Court. *Affirmed.*

John Morris, R. C. Bell, J. M. Barrett, S. L. Morris and S. E. Williamson, for appellant.

Allen Zollars, C. H. Worden and A. A. Chapin, for appellee.

HOWARD, J.—This was an action by appellee against appellant for damages alleged to have been caused by the obstruction of natural watercourses. It is alleged in the first paragraph of the complaint, that in the year 1881 the appellant constructed its railroad over the Yellow river, a tributary of the Kankakee; that from time immemorial during the springtime and rainy seasons of the year the waters in said river are swollen by rains and freshets, so that the river rises above its ordinary channels and flows in high water channels, having well defined beds and banks, and requires for the free passage of the water a much wider waterway than at other seasons of the year; that at the time of the construction of its said road appellant built a bridge over said river eighteen hundred feet in length across the ordinary channel, and, at a short distance to the west of said bridge, built two other bridges, each fifty feet in length, for the free passage of water running in said high water channels of said river when so swollen by rains and

The New York, etc., R. R. Co. v. The Hamlet Hay Co.

freshets; that afterwards, in 1886, appellant, unnecessarily and negligently, filled up all the waterways under said bridges with embankments of earth, except the space of one hundred and nineteen feet in length under the longest of said bridges, which space so left was insufficient for the free passage of water when the river was so swollen by rains and freshets as aforesaid; that during the spring of 1892 the water in the river was so increased by rains and freshets that it could not flow through the space left under said bridge, but, by reason of the filling up of said passageway by embankments of earth, the water was obstructed and dammed up so that it overflowed appellee's land, spoiling and rendering worthless the hay and growing grass thereon.

The second paragraph of the complaint differs from the first principally in alleging that the passageways under the smaller bridges, and which were filled up by embankments, were separate and distinct water courses flowing into Yellow river.

It is contended that the complaint is fatally defective, first, "because neither paragraph avers that the manner of crossing Yellow river was not necessary to secure life and property, nor is it averred that the bridge could have been maintained in a different manner without injury to appellant's franchise."

This objection is based, as we think, upon a misapprehension of the provisions of clause five, section 5153, Burns' R. S. 1894 (3903, R. S. 1881), by which clause a railroad corporation is empowered:

"Fifth. To construct its road upon or across any stream of water, watercourse, road, highway, railroad, or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or

The New York, etc., R. R. Co. v. The Hamlet Hay Co.

watercourse, road or highway thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

The "life and property" and the "franchises" referred to in the statute are not those of the railroad corporation, but those connected with the "stream of water, watercourse, road, highway, railroad or canal," across which the corporation constructs its road. The statute forbids the corporation to cross a stream or highway in such a manner as to interfere with the free use of such stream or highway, or in such a manner as to endanger the lives or injure the property of those using or having interests in the stream or highway; and it requires, further, that after the crossing is made the corporation shall restore such stream or highway to its former state, or at least so far as necessary to preserve its usefulness and its franchises. So far as the corporation's own property and franchises, and the safety of its employes and passengers are concerned, the statute was intended to make no provisions. See as to duty to restore stream or highway to its former condition, *Lake Erie, etc., R. R. Co. v. Smith*, 61 Fed. 885; *Lake Shore, etc., R. W. Co. v. McIntosh*, 140 Ind. 261.

It is next objected that the waters which backed up over appellee's lands were flood waters occurring during a rainy season, and as such were surface waters against which appellant had a right to build its embankments, even to the damage of appellee. There is no doubt that flood water which leaves the channels of a stream and spreads out over the adjacent lands, running in different directions or settling in pools and flats, ceases to be a part of the stream and becomes in effect surface water. Such, however, was not the character of the waters here alleged to have been thrown back upon appellee's land. The com-

The New York, etc., R. R. Co. v. The Hamlet Hay Co.

plaint says: "From time immemorial, during the springtime and rainy seasons of the year, the waters in said river are swollen by rains and freshets, so that the river rises above its ordinary channels and flows in highwater channels, having well-defined beds and banks, and requires for the free passage of the water a much wider waterway than in other seasons of the year." It was this water, flowing down the stream within the highwater channels, a part of the river, in fact, that was obstructed by the embankments and thrown back upon appellee's land. Besides, the embankments here complained of were not built as levees to keep waters back from flowing upon the builder's own land, but obstructions that prevented the waters from flowing freely down the stream as they would otherwise naturally have done.

So far as concerns the claim made that the embankments were built in a careful manner, and so as to protect the charter rights of the appellant, we may say, as was said in the *Evansville, etc., R. R. Co. v. Dick*, 9 Ind. 433, that the embankments may have been erected in a proper manner, so far as appellant's interest is concerned, and still be constructed in such a manner as necessarily to injure appellee. In such case there can be no place for the maxim *damnum absque injuria*, and the appellee must have its right of action for damages.

The third objection to the complaint is, that there is no allegation that the appellee was free from fault in causing the damage done. It may be doubted whether this is such a case as to call for that allegation. This is not such a case as *City of South Bend v. Paxon*, 67 Ind. 228. The statement of the injury in this case and of its cause is such as to preclude fault on the part of any one except the party causing the obstruction to the watercourse. As a matter of fact, however, if this

The New York, etc., R. R. Co. v. The Hamlet Hay Co.

were necessary, the complaint does, in each paragraph allege that the damage was caused "without any fault or negligence of the plaintiff."

The objection that there is no allegation that appellant knew or could have known that such floods were likely to occur, or that there was any lack of diligence on its part in providing a sufficient outlet for the water, is equally without pertinency. The complaint shows that from time immemorial such floods were liable to occur in the springtime and rainy seasons. If the appellant did not know this it ought to have known it. As said in *Wood on Railways*, section 271, the company should have exercised "the highest circumspection" in making provision for unusual stages of water. See, also, *Bellinger v. N. Y. Cent. R. R. Co.*, 23 N. Y. 42.

The sustaining of a demurrer to the fifth paragraph of the answer is next assigned as error. In this paragraph it was averred that the appellee was not the owner of the overflowed lands at the date of constructing the embankments; and that "the complete injury, if any, was then done, and the right of action, if any, accrued then." This position is not tenable. The record does not show any injury caused by the obstructions until the spring of 1892. As said in *Sherlock v. Louisville, etc., R. W. Co.*, 115 Ind. 22, so long as no injury resulted to appellee it was entirely immaterial to it in what manner the bridge was maintained by the railway company on its own land. The company was required by law to construct and maintain its bridges "in such manner as to afford security for life and property." It was not until the natural flow of the stream was obstructed in 1892, in such a manner as to damage appellee's property, that a right of action for damages accrued. It may be very true, as in the case cited by counsel, *Lake Erie, etc., R. R.*

The New York, etc., R. R. Co. v. The Hamlet Hay Co.

Co. v. Young, 135 Ind. 426, 41 Am. St. 430, 58 Am. and Eng. R. R. Cas. 665, that at the time of constructing the embankment under the trestles a suit for injunction might have been brought, to prevent a multiplicity of actions for damages and for other reasons stated in that case. No action for damages, however, could accrue until some damage had been caused.

The jury returned a special verdict in the case, in the form of answers to interrogatories, upon which the court rendered judgment for the appellee. It is urged that the court erred in submitting certain of these interrogatories to the jury, and also in refusing to require more specific answers to others. The acts so complained of, however, occurred during the progress of the trial, and, if erroneous, the court should have been given an opportunity to reconsider them in passing upon the motion for a new trial. The alleged errors ought therefore to have been given as reasons for a new trial, and not, as here, made independent assignments of error. Moreover, we do not find that any of the rulings so called in question were harmful to appellant, if, indeed, in any respect erroneous.

In contending that the evidence does not sustain the verdict, counsel for appellant say: "It was incumbent on appellee to prove the existence of the alleged watercourses, and their obstruction by appellant. All other questions are incidental." In this statement of counsel the extent and character of the evidence required to support the finding of the jury are well indicated. It is enough for us to say as to this, that we have carefully gone over the objections raised by counsel to the sufficiency of the evidence, and find all such objections without merit. There was competent and sufficient evidence to show the existence of the watercourses and their obstruction, as alleged in the com-

plaint. Indeed the very building of the several trestle bridges in the beginning goes very far to establish the existence of the watercourses under each of said bridges. The appellant was at that time evidently of opinion that the 1800-foot bridge, and the shorter bridges then built, were necessary in order to allow the free passage of the waters down the Yellow river and the other watercourses referred to in the complaint. It cannot be questioned that the waters in controversy would all have flowed down through Yellow river and into the Kankakee, as they had done from time immemorial, had it not been for the embankments complained of. That the banks of the stream are not everywhere clearly and sharply defined is not controlling. The character of the country through which the stream flows must be taken into account. Where the country is hilly or rolling, the fall rapid and the soil easily cut and washed there will in general be a deep and well marked channel. Where, however, the country is flat the fall slight and the soil turfy and full of roots and strong grass, there the channel will often be shallow and the sides in many places not sharply defined.

But, as said in *Mitchell v. Bain*, 142 Ind. 604, citing authorities, "A stream does not cease to be a watercourse and become mere surface water because at a certain point it spreads over low ground several rods in width and flows for a distance without a defined channel or banks before flowing again in a definite channel. * * * If a watercourse is lost in a swamp or lake, it is still a watercourse if it emerges therefrom in a well defined channel." So, too, it was said in *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349, the mere fact that because of the level character of the land the water of a stream spreads over a wide space without apparent banks does not deprive it of its character as a watercourse, provided it usually flows

The New York, etc., R. R. Co. v. The Hamlet Hay Co.

in a continuous current. See also *Board, etc., v. Wagner*, 138 Ind. 609.

The Kankakee valley is a nearly level country, the soil generally peaty on the surface, and covered with a strong growth of native grass. The streams are consequently shallow and sluggish until swollen in the rainy season, when they rise above the usual dry-weather banks and flow in broad, strong bodies down the valley. Such streams are, however, watercourses quite the same as if they flowed within rocky and unchangeable banks. It was incumbent on appellant, in the construction of its road, as we have already seen, to take notice of this character of the country, and provide ample accommodations for the free passage of the waters over its right of way at all seasons of the year. The jury took a moderate view of what was shown by the evidence to be such sufficient passageway for the waters of Yellow river, and fixed it at 500 feet, instead of 119 feet, as left by the embankment complained of.

As to the instructions of the court we need only say that we have gone over them carefully and are impressed with the great care and ability shown in their preparation by the distinguished judge who presided at the trial. Whether certain instructions requested were properly refused we need not inquire, inasmuch as it is not shown whether the instructions set out in the record were all the instructions given; and in so far, if at all, as the instructions refused were properly applicable, they may have been covered by other instructions given. Neither need we consider what is said as to the excessive amount of the judgment, on account of interest allowed. There can be no doubt that a judgment for some amount was proper, and there was no motion to modify the judgment. *W. U. Tel. Co. v. State*, 147 Ind. 274.

Judgment affirmed.

The New York, etc., R. R. Co. v. The Hamlet Hay Co.

ON PETITION FOR REHEARING.

PER CURIAM: It was held in the principal opinion that the alleged "excessive amount of the judgment on account of interest allowed" could not be considered, for the reason that there was no motion to modify the judgment. Counsel contend that the error so made, if it were one, could have been considered in passing upon the action of the court in overruling the motion for a new trial. That might be true if the question were merely one as to excessive damages, particularly if returned in a general verdict. In this case, however, the verdict was by way of answers to interrogatories, as provided in the act of March 11, 1895 (Acts 1895, p. 248), which required that the jury "find one single fact in answering each of such interrogatories." In the case at bar, the jury found, in answer to one interrogatory, that the damages caused by loss of hay and grass amounted to \$4,680. In answer to another interrogatory, the jury found what would be the interest on this sum at six per cent. from the time the damage was done. Certainly a new trial could not change the finding as to this latter fact. It was a mere matter of mathematical calculation. Whether such interest should be added to the damages found for injury to hay and grass was a question to be decided when the judgment came to be entered. In the contention now made, no question is raised as to the correctness of that part of the judgment covering injury to hay and grass. If therefore the judgment were erroneous only by the excess caused by adding interest to the damages, that must be an error to be corrected by motion to modify. The error, if any, was not as to any fact found by the jury, or which could be corrected on another trial, but one of law by

the court to be corrected by a modification of its judgment.

Undoubtedly if the damages found for loss of hay and grass were excessive, the remedy would be by a new trial, and appellant's authority, *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548, would be in point. But it is not contended that this part of the judgment is incorrect, but only that interest should not have been added. "Where any part of a judgment is valid," said this court, in *Bayless v. Glenn*, 72 Ind. 5, "it will stand unless proper steps have been taken by objection duly presented to the trial court to secure a modification or amendment, by amending or rejecting the part which is wrong." This ruling was cited with approval by Judge Mitchell, in the *People's, etc., Ass'n v. Spears*, 115 Ind. 297. So it was said, in *Wood v. State*, 130 Ind. 364, "If the evidence entitled the appellee to some judgment in his favor it cannot be set aside because the court gave too large a judgment, there having been no motion to modify." And in the recent case of *Chicago, etc., R. W. Co. v. Eggers*, 147 Ind. 299, citing numerous authorities, the like holding is reiterated. Petition overruled.

GRZESK ET AL. v. HIBBERD, TRUSTEE.

[No. 18,837. Filed Nov. 23, 1897. Rehearing denied Jan. 28, 1898.]

HUSBAND AND WIFE.—*Mortgage of Lands Held by Entireties.—Suretyship.*—A mortgage executed by a husband and wife on lands which were held by them as tenants by entireties, but which had been conveyed to the husband through a trustee, to secure the individual debt of the husband, is but an evasion of the statute forbidding the wife to enter into contracts of suretyship, and void, where such deeds and mortgage were in fact one transaction, notwithstanding the mortgagee stated to the wife prior to the execution of the deed that she must, in order to make the mortgage valid, make an absolute gift of the land to her husband, where there is no evi-

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Grzesk *et al.* v Hibberd, Trustee.

dence to show that she intended by the deed to make an absolute gift thereof, but that the land was conveyed back to them jointly after the execution of the mortgage.

From the St. Joseph Circuit Court. *Reversed.*

Thomas W. Slick and F. J. Lewis Meyer, for appellants.

Andrew Anderson and James DuShane, for appellee.

MCCABE, J.—The appellants sued the appellee to quiet their title to lot 25 in Fowler's subdivision of bank out-lots 85 and 86 in the city of South Bend. A cross-complaint filed by the defendant sought to foreclose the mortgage against which it was attempted to quiet the plaintiff's title. A trial of the issues formed resulted in a finding and judgment against the plaintiffs, and a foreclosure of the defendant's mortgage, the court overruling their motion for a new trial. The correctness of that ruling is the only question presented by the record.

The particular error complained of in the motion for a new trial is that the finding for the defendant is not supported by, and is contrary to the evidence, and also contrary to law.

The uncontradicted evidence shows that appellants are, and have been husband and wife ever since and prior to August 29th, 1887. That on that date they became the owners of the real estate in question as tenants by entireties; that on October 24th, 1894, appellant, Wladyslaw Grzesk, husband of the other appellant, was indebted to Hill Brothers in the sum of over \$800.00. And afterwards, plaintiffs, as husband and wife, were induced to convey the real estate to a third person, in order that such person should convey it back to the husband alone, for the purpose of enabling the husband and wife to make a mortgage on said real estate to secure the above-mentioned debt of the husband, all of which was accordingly done. And

Grzesk et al. v. Hibberd, Trustee.

the sole question to be determined by the evidence was and is whether the conveyance mentioned by which the title to the real estate mortgaged was attempted to be vested in the husband alone was an independent transaction, in which the sole purpose of the wife was to make a permanent gift of her interest therein to her husband, or were such conveyances a mere contrivance by and between all the parties to evade the statute forbidding a married woman from becoming surety for another? The evidence further shows without contradiction that Wesley Hill, one of the firm of Hill Brothers, in company with the appellee, his attorney, went to the house of the appellants, in South Bend, and made an arrangement with the appellant Agnes Grzesk and her husband to secure the debt of the latter to Hill Brothers which was carried into effect by executing the conveyances and the mortgage already mentioned, which mortgage was to the appellee, Hibberd, as trustee for the Hill Brothers.

It is earnestly insisted that the evidence tending to support the finding for the defendants, considered alone, affords ample support thereto. The strongest and only evidence on the defendant's side is his own testimony and that of one of the Hill brothers. The defendant Hibberd testified as follows: "Q. Do you recollect of going to Grzesk's house along with Mr. Hill? A. Yes, sir. Q. Do you remember at that time of having a talk with Grzesk and his wife, about securing an indebtedness due Hill Brothers? A. Not before Mr. Hill came after me. Q. State * * * what the conversation was * * * from beginning to end. A. * * * The substance was this: She was anxious, and said so, to get this settled up, and have no trouble, and wanted to give security. * * * She said she wanted to secure it, so Mr. Hill would be satisfied. I told her that they held the

property by a joint deed, and that Mr. Hill couldn't take a mortgage on the property the way the title stood, that it would be of no good. I says: 'The only way, Mrs. Grzesk, you can do, if you want to, you can give your interest in the property to your husband. You can do that, and I shall not advise Mr. Hill to take a mortgage unless this is done. There is no compulsion about it. You can suit yourself about that. Use your own judgment about it. If you want to do that, we will take a mortgage. If you do not do that, we will not take a mortgage because, it will not be of any good.' Then she says: 'That is all right; any way to fix it up so it will be satisfactory.' I says: 'In order to do that, it will be necessary to make two deeds. I have a lady in my office, who is a single lady, and she will act as trustee; and I will draw a deed for you and your husband to sign, deeding it to Miss Jennings, and then she will sign a deed deeding it over to your husband, and then it will be his land. Then,' I says, 'we will make the mortgage.' She said, 'go ahead.' That was the substance of the conversation. * * * I had the deeds prepared at my office. * * * There was nothing said about conveying it back to the wife after the mortgage was made, or holding it for her benefit. * * * I was acting as attorney for Hill Brothers." On cross-examination by plaintiffs' counsel the witness said: "She didn't tell me she wanted to secure the debt of her husband. * * * She wanted to satisfy Hill Brothers, so that there would be no trouble about it,—her husband would not be troubled. * * * I think the first thing that was mentioned was the amount due. * * * I told him what the amount was. * * * She said she wanted to fix it up so Mr. Hill would be satisfied. 'Well,' I says, 'you own this property by a joint deed;' and I

Grzesk et al. v. Hibberd, Trustee.

says, 'the only way you can do, that I would advise Hill to take as security, is for you to deed it over to your husband. If you want to give it to him absolutely, I will advise Mr. Hill to take a mortgage. If you don't do that, I won't advise him to take a mortgage.'

Q. You went up there for that purpose * * * of getting this fixed up so you could advise him to take the security that way? A. If possible, yes sir. * *

* * I told her how the title was, and that it would have to be conveyed to him if she wanted to do that to secure the debt. * * * That was the purpose.

* * * I had the mortgage signed by Grzesk and wife after the deeds were made." Wesley S. Hill testified: "I went down, and got Mr. Hibberd, and went up to the house, and they were all there in the room. and we talked it over with them. Mr. Hibberd told them, in order to give security, as they held their property jointly, it would be necessary for Mrs. Grzesk to deed her property or give it to her husband, as the mortgage would not be worth anything, holding the property jointly, that they couldn't give a mortgage that would be good. * * * She said she would sign the deed anyway, so her husband could give the mortgage."

The undisputed evidence shows, also, that the deed from Grzesk and wife to Miss Jennings, and the deed from Miss Jennings conveying the property back to the husband alone, were executed at the same time. and about the same time the mortgage was made by Grzesk and wife to the appellee Hibberd, as trustee for Hill Brothers to secure the debt of the husband to them. And that both the deeds and the mortgage were taken possession of by appellee, Hibberd, and taken by his agent Miss Jennings, and, under his direction, she delivered all of them to the recorder of the county in his office, and the same were procured

Grzesk et al. v. Hibbard, Trustee.

to be recorded without Grzesk paying anything for recording any of the deeds. There was no consideration paid for the conveyance to Miss Jennings and no consideration paid for the conveyance from Miss Jennings to Wladyslaw Grzesk, the husband; and afterwards, on September 30th, 1896, the appellants, Wladyslaw Grzesk and Agnes, his wife, conveyed the premises back to the same Miss Jennings, and she on the same day, at the same time, conveyed the same back to said Agnes Grzesk and Wladyslaw Grzesk, without consideration.

The appellants' contention is that this evidence shows that the mortgage is void, as it is a contract of suretyship on the part of the wife. It is settled under the statute as to married women that all contracts of suretyship entered into by them are void, no matter who for. *Vogel v. Leichner*, 102 Ind. 55.

The appellants contend, and the appellee concedes, that the law is that a mortgage executed by a husband and wife on real estate held by them, as tenants by entireties, as was the case here, before the conveyances to Miss Jennings, and from her back to the husband, to secure the debt of the husband, being void as to the wife by virtue of the statute forbidding her from entering into contracts of suretyship, it is also void as to the husband. *Dodge v. Kinzy*, 101 Ind. 102-106, and cases cited.

But it is contended that this is not such a contract; that the transaction exhibited in the evidence resulted in vesting the entire title in the husband absolutely; and that he therefore had the right to mortgage his own real estate to secure what is conceded to be his own preexisting debt. In support of this proposition we are cited to *Long v. Crosson*, 119 Ind. 3. The facts in that case are such as to make an entirely different question than the one arising upon the

Grzesk et al. v. Hibberd, Trustee.

facts here. There, Mattie Long, wife of James Long, being the owner in her own right of a certain lot in the town of Fowler, in Benton county, executed a deed, in which her husband joined, by which she conveyed the lot to John Dempsey, for the nominal consideration of \$1,500.00. Dempsey, on the same day, for a like consideration, conveyed the property to James Long, husband of Mattie Long. There was no consideration actually paid or agreed to be paid for either of the foregoing conveyances, they having been made merely to invest James Long with the title, so that he might secure a loan of \$500.00, which he desired to make for his own benefit. Afterwards, on October 17, 1881, Crosson, upon the recommendation and solicitation of Dempsey, made a loan of \$500.00 to Long, and took a mortgage as security upon the property owned and conveyed as above, in which both Long and wife joined. Dempsey, who knew of the purpose for which the title had been transferred from Mrs. Long to her husband, furnished Crosson \$250.00 of the money thus loaned to Long, and took Crosson's note for that amount. The title had stood some six months in the name of James Long at the time Crosson made the loan, and the evidence showed that he took the mortgage upon the faith of an abstract of title furnished him, and that he had no knowledge that the title had been transferred merely to enable Long to make the loan and to evade the statute which prohibits a married woman from entering into any contract of suretyship. The title had ever since remained in the husband. This court there said: "Upon the facts thus summarized, the court below gave judgment of foreclosure against both the mortgagors. The wife prosecutes this appeal. * * * Conformable to the maxim which declares that whatever is prohibited by law to be done directly cannot legally be effected by

an indirect and circuitous contrivance (Broom Legal Max. 432), it was held in *McCormick, etc., Co. v. Scovell, supra* [111 Ind. 551], that where a husband and wife joined in conveying real estate owned by them as tenants by entireties, to a third person, the latter conveying to the husband so as to enable him to mortgage the property to secure an antecedent debt owing by him to another, who knew of the purpose for which the several transfers were made, the deeds and mortgage constituted substantially one transaction and were void as an evasion of the statute which prohibits a married woman from entering into a contract of suretyship. Whatever device may be resorted to for the purpose of evading the statute, if the person seeking to enforce the contract knew of, or participated in the design, or purposely remained ignorant, courts will deal with the transaction according to its substance, regardless of the form in which it may have been disguised." But in the case then before the court, inasmuch as the title had been in the husband at the time the mortgage was taken more than six months, and had remained so ever since, notwithstanding more than seven years had elapsed, and that the mortgagee had no knowledge of the purpose for which the title had been transferred from Mrs. Long to her husband, it was held that the principles announced in the case of *McCormick, etc., Co., v. Scovell, supra*, did not apply, and the foreclosure ought to be upheld, and it was so adjudged. But the facts established here by the evidence fall squarely within the principle of *McCormick, etc., v. Scovell, supra*. The same rule was laid down by this court in *Sohn & Co. v. Gantner*, 134 Ind. 31.

The evidence we have quoted, and that most favorable to appellee, shows that the sole purpose of the conveyance of the property from the appellants to

Grzesk et al. v Hibberd, Trustee.

Miss Jennings, and her conveyance back to the husband, was to enable him to make a valid mortgage on the property to secure his individual debt, and that the beneficiaries in that mortgage, as well as the mortgagee, their trustee, knew all about the purpose of the conveyance, and that it was for the sole purpose of evading the statute forbidding the wife to enter into contracts of suretyship. In fact, they knew that the deeds and mortgage were but one and the same transaction, and that the deeds were as much for their benefit as the mortgage. Appellee's learned counsel have laid much stress upon the fact that appellee Hibberd told his wife, in the conversation resulting in the conveyances and mortgage, that she must make a gift of the property to her husband, so that it would be his absolutely, or the mortgage would be of no force. But there is no evidence to show that she did intend by the transaction to make her husband the absolute owner of the property; but there is evidence to the contrary, and that is that she and her husband afterward conveyed the property back to the same person that they had before conveyed it to, Miss Jennings, and she at once conveyed it back to them jointly, vesting the title precisely where it was in the start. But be that as it may, if the only purpose in the conveyances vesting the title in the husband alone was to evade the statute, the transaction fell within the condemnation of the law, and the mortgage was void; and such is the clear purport of the evidence.

Our conclusion is that the finding was contrary to law and the evidence, and hence the court erred in overruling the motion for a new trial. The judgment is reversed, and the cause remanded, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Howard, J., took no part in this decision.

Dudley et al. v. Pigg.

DUDLEY ET AL. v. PIGG.

[No. 18,360. Filed Dec. 9, 1897. Rehearing denied Jan. 28, 1898.]

WILLS.—Election by Widow.—Complaint to Set Aside Election.—Sufficiency.—Exhibit.—In an action to revoke and cancel an election made by a widow to take under the will of her deceased husband it is not necessary that a copy of such election be filed with the complaint as an exhibit. p. 364.

SAME.—Election by Widow to Take Under the Law.—Statute Construed.—Under section 2666, Burns' R. S. 1894, the widow of a person dying testate takes under the will, unless within one year after the probate thereof she makes her election to take under the law, and the mere execution of an election to take under the will will not estop the widow from maintaining an action, within the time allowed by law for such election, to revoke or cancel the election so made and filing her election to take under the law. pp. 367, 368.

APPEAL AND ERROR.—Bill of Exceptions.—A bill of exceptions presented to and signed by the judge after the time allowed for filing same, forms no part of the record on appeal. p. 368.

SAME.—Record.—Bill of Exceptions.—Motion to Strike Out Part of Pleading.—A motion to strike out part of a pleading, the ruling thereon, and the pleading or the part thereof stricken out, are not in the record, unless brought in by a bill of exceptions, or by an order of court. pp. 368, 369.

SAME.—Record Imports Absolute Verity.—The record on appeal imports absolute verity, and where a motion to strike out part of a pleading is not made part of the record by order of court or by bill of exceptions, and the clerk copies into the record the portion stricken out, the Supreme Court cannot disregard such part, but must, unless the proper correction is made by a writ of *certiorari*, consider the pleading as if no part thereof had been stricken out. pp. 369, 370.

ESTOPPEL.—Pleading.—Sufficiency.—Where an estoppel is relied upon it must be pleaded with particularity and precision, and nothing can be supplied by intendment, and when there is ground for inference or intendment, it will be against, and not in favor of the estoppel. p. 371.

SAME.—Parties.—Only parties and their privies are bound by or can take advantage of an estoppel, and one who insists upon the acts of another working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if the other is permitted to withdraw or deny the act. p. 371.

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Dudley *et al.* v. Pigg.

From the Sullivan Circuit Court. *Affirmed.*

Pigg & Brown, for appellants.

G. W. Buff and *W. B. Nesbit*, for appellee.

MONKS, J.—Appellee, widow of Joseph N. Pigg, brought this action against appellants to revoke and set aside an election executed by her to take under the will of said deceased husband. A demurrer to the complaint was sustained, and, an additional paragraph of complaint being filed, a demurrer to the same was overruled. An answer in three paragraphs was filed, to the second and third of which a demurrer for want of facts was sustained. Final judgment was rendered in favor of the appellee.

The errors assigned, and not waived, call in question the action of the court in overruling the demurrer to the additional paragraph of the complaint, and in sustaining the appellee's motion to strike out a part of the second paragraph of answer, and in sustaining appellee's demurrer to the second and third paragraphs of answer.

The first objection urged to the additional paragraph of complaint is that no copy of the election to take under the will is filed with said paragraph. As this action is not founded upon the election, but is to revoke, cancel, and set the same aside, it was not necessary to file the same, or a copy thereof, as an exhibit, with said paragraph of complaint; and, if the same had been so filed, it would not be a part thereof, nor could it be considered in determining the sufficiency of such paragraph. *Gum-Elastic Roofing Co. v. Mexico Publishing Co.*, 140 Ind. 158, 160-161, 30 L. R. A. 700, and cases cited; *Johnson v. Moore*, 112 Ind. 91; *Barkley v. Tapp*, 87 Ind. 25, 27; *Stout v. Stout*, 77 Ind. 537, 540; *Heitman v. Schnek*, 40 Ind. 93, 97, and cases cited.

Dudley *et al.* v. Pigg.

It is alleged in the additional paragraph of complaint: That the will of said testator, Joseph N. Pigg, was admitted to probate December, 1896. That after the death of said testator, when the contents of said will were made known to appellee, she declared to the heirs and legatees that she would not accept the provisions of said will, but would make her election to take under the laws of the State of Indiana. "That thereupon the legatees and heirs, when they learned of the plaintiff's desire so to elect to take under the law, began a course of conduct to persuade and induce the plaintiff to accept the provisions of the will. That at the time the plaintiff was greatly grieved and distressed over the recent loss of her husband, and was not in a suitable condition, physically or mentally, to transact business of the character and nature of the matter in hand, a fact which the said defendants well knew. Said defendants well knowing that plaintiff had great respect for her late husband, deceased, and had always endeavored to comply with his wishes and desires, they then and there told the plaintiff that she ought, in good conscience, to respect the wishes of her said husband, as expressed in said will, as the same affected the disposition of his estate; that to do otherwise would be to show great disrespect and disregard for her late husband's wishes. And, as a further inducement to obtain the execution by this plaintiff of an election to take under the will, said defendants represented to the plaintiff that the provisions made for her were ample, and all that she would likely need, and that they would not disturb her in the possession of the household and kitchen furniture, and she could retain and keep two dozen chickens, household and kitchen furniture, chairs, carpets, dishes, stoves, safes, cupboard, and everything she might desire to keep in the house, together with beds and bedding, hay and

Dudley et al. v. Pigg.

corn for her horse and cow, and such things as would make her comfortable and enable her to keep house without incurring expense for such things as she would need. That this plaintiff, being then aged and greatly grieved and distressed in mind, was more easily influenced than she would have been under other circumstances, facts the defendants well knew, and, not being in a condition, mentally, to comprehend and understand the exceeding meager provisions made for her in said will, was induced by said defendants, by means aforesaid to execute an election to take the provisions made for her in said will, a copy of which election is filed herewith and made a part of this complaint, which said election was so procured to be executed on the 28th day of December, 1896, in ten days after the death of her said husband. This plaintiff now avers that said defendants, at the time they so agreed to leave the plaintiff undisturbed in the ownership, use, and enjoyment of the property and household furniture aforesaid, had no intention of so doing, in case they could induce the plaintiff to elect to take under the will, but, upon the contrary, they expected to take all such property as a part of the estate of said Pigg, deceased, and wholly deprive the plaintiff of the use and enjoyment thereof, which facts were wholly unknown to the plaintiff, and which secret intention was concealed from her and was so done for the fraudulent purpose of procuring the plaintiff so to execute the election to take under the said will, a thing she would not have done in the absence of such promises, statements, and persuasions so made by the defendants. And she now says that when she executed said election she was taken to the town of Sullivan with some of the defendants, and in the stores was importuned to make such election by some of the defendants, and was taken to the office of the attorney

Dudley *et al.* v. Pigg.

for the executor, and did then, on said day aforesaid, execute said election. And she now says that immediately thereafter the said defendants, including the executor, proceeded to inventory and sell everything in and about the house, including dishes, stoves, carpets, safes, and literally stripping the house of its contents, leaving the plaintiff only one bed and feather tick and two pillows and one old chair." This action was commenced February 15, 1897.

Under section 2666, Burns' R. S. 1894 (Acts 1885, p. 239), the widow of a person dying testate, takes under the will, unless within one year after the probate of such will she makes her election to take under the law. This election must be in writing, signed by the widow, and acknowledged before some officer authorized to take the acknowledgment of deeds, and be filed and recorded in the office of the clerk of the circuit in which such will is probated, and recorded by such clerk in the record of wills. Unless she elects to take under the law, as required by said section, her rights are governed by the will. *Archibald v. Long*, 144 Ind. 451, 454, and cases cited; *Burden v. Burden*, 141 Ind. 471, 476; *Garn v. Garn*, 135 Ind. 687; *Draper v. Morris*, 137 Ind. 169; *Fosher v. Williams*, 120 Ind. 172; Henry's Probate Law and Prac., section 915.

The widow's right to elect within the year to take under the law cannot be barred except by such conduct on her part as will constitute an estoppel. *Burden v. Burden*, *supra*, p. 476; *Garn v. Garn*, *supra*, p. 690. The mere execution of an election to take under the provisions of the will and filing the same with the clerk, as required by statute in making an election to take under the law, will not estop such widow from afterwards making an election as required by the statute to take under the law. Innocent parties, however, relying on such election by the widow to take under

Dudley et al. v. Pigg.

the will, might be induced so to deal with the property of the testator, as that such widow, as against them, would not be permitted thereafter, although within the year, to make an election to take under the law. For this reason the widow, after she has filed an election to take under the will, may, within the year, commence and maintain an action to cancel the same, and file her election to take under the law. *Burden v. Burden, supra; Garn v. Garn, supra; Henry's Probate Law and Prac., sections 916, 917.* There is nothing in the additional paragraph of complaint showing that appellee, at the time she commenced the action, had done anything to estop her from electing to take her share in the estate of her deceased husband under the law. On the contrary, it appears that she was aged and feeble, and that on account of the importunities and promises of the heirs and legatees she was induced to make and file, within ten days after the death of her husband, an election to take under the will, when the statute in no way authorized or required such an election. There was no error in overruling the demurrer to the additional paragraph of the complaint.

Appellee's motion to strike out a part of the second paragraph of answer was sustained on June 5, and thirty days were given in which to file a bill of exceptions. A bill of exceptions was presented to and signed by the judge on July 19, and on the same day was filed in the office of the clerk of the court below. As the bill of exceptions was presented to the judge more than thirty days after June 5, the same forms no part of the record. *Elliott's App. Proced., sections 802, 805.* The said bill of exceptions not being a part of the record the alleged error of the court in sustaining the motion to strike out a part of said second paragraph of answer is not properly saved, and no question

Dudley *et al.* v. Pigg.

is presented. The ruling of a court in sustaining a motion to strike out a part or all of a pleading, and the pleading or the part thereof stricken out, and the motion to strike out, are not in the record unless brought in by a bill of exceptions or order of court. *Collins v. Cornwell*, 131 Ind. 20; *Holland v. Holland*, 131 Ind. 196, 200; *McDonald v. Geisendorff*, 128 Ind. 153, 156; *Balue v. Richardson*, 124 Ind. 480, 481; *City of Seymour v. Cummins, Admx.*, 119 Ind. 148, 150, 5 L. R. A. 126; *Board, etc., v. Hill*, 115 Ind. 316, 321; *Laverty v. State, ex rel.*, 109 Ind. 217, 225; *Carrothers v. Carrothers*, 107 Ind. 530, 532; *Scotten v. Randolph*, 96 Ind. 581, 587; *Newcomer v. Hutchings*, 96 Ind. 119, 122; *Fellenzer v. Van Valzah*, 95 Ind. 128, 132; *Peck v. Board, etc.*, 87 Ind. 221, 222; *Klingensmith v. Faulkner*, 84 Ind. 331, 333; *State, ex rel. v. Krug*, 82 Ind. 58, 60; *Dunn v. Tousey*, 80 Ind. 288, 290; *Stanton v. State, ex rel.*, 74 Ind. 503, 507; *Stott v. Smith*, 70 Ind. 298; *Berlin v. Oglesbee*, 65 Ind. 308, 310; *School Town of Princeton v. Gebhart*, 61 Ind. 187, 197; *Broker v. Scobey*, 56 Ind. 588, 589-590; *Thomas v. Passage*, 54 Ind. 106, 110, 115; *Greensburgh, etc., Turnpike Co. v. Sidener*, 40 Ind. 424, 426; *Merritt v. Cobb*, 17 Ind. 314.

When a part or all of a pleading is stricken out on motion, the clerk in making a transcript for an appeal, should not copy into such transcript the part stricken out, for the reason that the same, after being stricken out, forms no part of the pleading, and is no part of the record, and can only be brought into the record by a bill of exceptions. When, however, the clerk does copy the part stricken out into the transcript as a part of the record, and there is no bill of exceptions showing that the same was stricken out, this court cannot disre-

Dudley *et al.* v. Pigg.

gard such part, but must, unless the proper correction is made by writ of *certiorari*, consider the pleading as if the same, or no part thereof, had been stricken out. This is the necessary result of the rule that the record imports absolute verity. In this case the bill of exceptions, which was presented to the judge and signed by him, after the time allowed therefor, and for that reason is no part of the record, shows that the clerk has copied the part of the second paragraph of answer which was stricken out on motion. As said bill of exceptions forms no part of the record, under the well settled doctrine that the record imports absolute verity, we are required to consider said paragraph as copied into the record by the clerk, for the reason that the record does not show that any part thereof was stricken out.

It is alleged in the second paragraph that appellee "agreed to accept the provisions of the will provided John R. Pigg would relinquish a lease which he then held upon the entire estate then owned by the said Joseph N. Pigg, deceased; that said John R. Pigg, upon the promise of the plaintiff [appellee] to accept the provision made for her by said will, agreed to relinquish his lease, and did so relinquish said lease, and give up his possession; that said John R. Pigg and Joseph N. Pigg owned at the decease of Joseph N. Pigg certain personal property, to wit [describing it], in partnership; that said property was of less value to John R. Pigg after the relinquishment of the lease than before, and that said property was sold February 3, 1897, at public sale of the property of said deceased; that said John R. Pigg would be greatly damaged if plaintiff be allowed to revoke her former acceptance, and now be allowed to take under the law."

It is claimed by appellants that the averments of said paragraph estop appellee from taking under

Dudley et al. v. Pigg.

the law, and it is upon this theory that the sufficiency of said paragraph must be determined.

It is not alleged that John R. Pigg, mentioned in said paragraph, was an heir or legatee of the testator; and there are no facts alleged in said paragraph showing that said John R. Pigg would suffer any damage if said appellee's election to take under the will is set aside, and she is permitted to take under the law. The allegation that he would be greatly damaged thereby is a mere conclusion, not supported by the facts alleged in said paragraph.

The rule is that, where an estoppel is relied upon, it must be pleaded with particularity and precision, and nothing can be supplied by intendment, and, when there is ground for inference or intendment, it will be against, and not in favor of the estoppel. *Troyer v. Dyar*, 102 Ind. 396; *Anderson v. Hubble*, 93 Ind. 570; *Cole v. Lafontaine*, 84 Ind. 446, 448; *Sims v. City of Frankfort*, 79 Ind. 446, 452; *Robbins v. Magee*, 76 Ind. 381; *Lash v. Rendell*, 72 Ind. 475; *Wood v. Ostram*, 29 Ind. 177; 8 Ency. of Pl. and Prac., 9-13.

Moreover, it is a well settled rule that only parties and their privies are bound by or can take advantage of an estoppel. *Chaplin v. Baker*, 124 Ind. 385, 390; *Cook v. Walling*, 117 Ind. 9, 11, 12, 2 L. R. A. 769; *Simpson v. Pearson*, 31 Ind. 1, 5-7; 7 Am. and Eng. Ency. of Law, 23; 5 Ency. of Pl. and Prac. 6.

Under this rule, one who insists upon the acts of another working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if the other is permitted to withdraw or deny the act. *Chaplin v. Baker, supra*; *Simpson v. Pearson, supra*.

John R. Pigg was not a party to this action, and appellants, who filed said paragraph of answer, were not

Keesling, Treasurer, et al. v. Powell.

his privies, either in blood, in estate, or in law, but were strangers to the transaction which is set up in said paragraph as an estoppel. The facts averred in said paragraph do not show that appellants, or either one of them, have in any way been misled or deceived or changed their position, in consequence of the election which appellee seeks to set aside. It is clear that the second paragraph of answer was not sufficient to withstand appellee's demurrer.

The third paragraph of answer set up an alleged verbal postnuptial agreement that appellee was to have no part of the estate of her husband, Joseph N. Pigg, if she survived him. All of the authorities cited to sustain this paragraph of answer are in regard to antenuptial agreements, and can have no application to the facts alleged.

Under the doctrine declared in *Randles v. Randles*, 63 Ind. 93, the third paragraph of answer was clearly bad. Finding no available error in the record, the judgment is affirmed.

KEESLING, TREASURER, ET AL. v. POWELL.

[No. 18,206. Filed February 1, 1898.]

EVIDENCE.—Hearsay Evidence.—Admissibility Of.—Tax Sales.—Action to Enjoin—In the trial of an action to enjoin the sale of real estate for delinquent taxes, evidence by plaintiff that prior to the purchase of such property he was informed by the deputy treasurer, since deceased, that such taxes had been paid, was properly admitted.

From the Cass Circuit Court. *Affirmed.*

Nelson & Myers, for appellants.

McConnell & Jenkins, for appellee.

MCCABE, J.—The appellee sued the appellants, treasurer, auditor, and commissioners of Cass county, to enjoin the sale of a certain described lot or piece of

Keesling, Treasurer, et al. v. Powell.

real estate in Logansport, in said county, for alleged delinquent taxes, and to cancel said tax as the same stands charged on the duplicate, on the ground that the same had been paid. A trial of the issues joined resulted in a finding and judgment for the plaintiff, over defendant's motion for a new trial.

The refusal of a new trial is questioned by the assignment of errors, that being the only question presented by the appeal. The grounds of the motion for a new trial are that the finding is contrary to law and the evidence, and not supported by sufficient evidence, and error in the admission of certain evidence.

The evidence, the admission of which is complained of, was the testimony of the plaintiff, who, being about to purchase the lot in question, inquired of the deputy treasurer, one William H. Forrest, whether said taxes had been paid, and he answered that they had. This evidence of the mere declaration of the deputy treasurer, it is claimed, was mere hearsay, and not admissible. But it is conceded that at the time of the admission of the testimony of the plaintiff, detailing the declaration of deputy treasurer Forrest, that the declarant, Forrest, was dead. It is also objected that it was no part of the duty of the treasurer to tell people whether taxes were paid or not. And it is further objected that the public cannot be estopped by the declaration of its officials respecting the public revenues. But it is a mistake to suppose that the object of the testimony was to estop anybody. The issue on trial was whether the tax in question had been paid. There was no attempt to defeat the collection of the tax on any other ground than that it had been actually paid.

The evidence shows that the deceased deputy treasurer whose declarations were put in evidence had the requisite means of knowing whether the matter de-

Keesling, Treasurer, et al. v. Powell.

clared was true. It also appears that it would be against the interest of the deputy treasurer, who practically performed all the duties of the county treasurer, to admit or declare that these taxes had been paid if they in fact had not. It might result in making the treasurer liable on his bond for the same, and the deputy liable to the treasurer, if in fact they had been paid to the deputy treasurer. In *Royse, Err.*, v. *Leaming*, 72 Ind., at p. 184, Woods, J., speaking for the court, said: "If the action of the court in admitting this testimony can be upheld, it must be on the ground that the declarations in question were secondary evidence, receivable only because of the death of the person who made them. Upon this subject the following language is found in 1 Greenleaf Evidence, section 147: 'This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent day. But, to render them admissible, it must appear that the declarant is deceased; that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest. When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other considerations.'" And in *Dean v. Wilkerson*, 126 Ind., at p. 340, Coffey, J., speaking for the court, said: "It is to be observed that Thomas Wilkerson was dead and could not be produced in court as a witness on behalf of the appellee. The declarations introduced in evidence were against the interests of Thomas Wilkerson, and related to a fact about which he possessed competent knowledge. This constitutes one of the exceptions to the general rule upon the subject of hearsay evidence. 1 Greenleaf Ev., section 147; *Royse, Err.*, v. *Leaming*, 72 Ind. 182.

Durflinger v. Baker.

"Mr. Greenleaf, Vol. 1, section 148, in discussing the admissibility of this class of evidence, says: 'The ground upon which this evidence is received, is the *extreme improbability of its falsehood*. The regard which men usually pay to their own interests is deemed a sufficient security, both that the declarations were not made under any mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true.' "

Following these decisions, as we do, there was no error in admitting the declarations of the deceased deputy treasurer in evidence.

As to the sufficiency of the evidence to sustain the finding, the case stands in all respects precisely the same as to the sufficiency of the evidence as the case of *Keesling v. Winfield*, *post*, 709, except that in this case the finding has the item of evidence consisting of the declaration of the deputy treasurer to support it, whereas in the case cited there was no such item of evidence. On the authority of that case, the finding is sufficiently supported by the evidence, and hence we cannot disturb it.

The circuit court did not err in overruling the appellants' motion for a new trial. Judgment affirmed.

DURFLINGER v. BAKER.

[No. 18,248. Filed February 1, 1898.]

SPECIAL FINDING.—*Venire De Novo*.—Where enough facts are found in a special finding to support a judgment thereon the remedy is not by a motion for a *venire de novo*, as the silence of the finding upon any issue is deemed a finding against the party tendering such issue. *p. 378.*

SAME.—*Conclusions*.—A judgment rendered upon a special finding will not be reversed because the finding contained conclusions, where, disregarding such conclusions, enough facts remain to support the judgment. *p. 378.*

149 378
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Durflinger v. Baker.

PLEADING.—*Evidence.*—*Practice.*—A written statement which is claimed to be the basis of an action is improperly admitted in evidence without pleading it, either in the form in which it was written, or for enforcement in a reformed condition. *p. 381.*

EVIDENCE.—*Written Contract Not Pleaded.*—Where a defense to an action sounds in contract, and the contract was in writing and not pleaded in the cause, such defense is a question of law that should have been presented by the pleadings, and not being pleaded was not in issue. *p. 381.*

TRIAL.—*Theory.*—*Practice.*—*Special Finding.*—Where both parties to an action, by their pleadings treat the contract concerning the questions in issue as in parol, no error was committed by the court in finding upon the oral testimony, notwithstanding the written contract, which was not pleaded, was admitted in evidence. *pp. 381. 382.*

From the Hamilton Circuit Court. *Affirmed.*

Thos. J. Kane, Ralph K. Kane, and Gavin, Coffin & Davis, for appellant.

Robert Graham, Robert N. Lamb, and Ralph Hill, for appellee.

HACKNEY, J.—The appellee, Baker, sued the appellant, Durflinger, to recover upon a promissory note for \$600.00, with interest and attorney's fees, and for the enforcement of a vendor's lien against certain real estate sold by Baker to Durflinger, and for which, it was alleged, said note was executed. The appellant answered, first, that the note was executed for the purchase money for the appellee's interest in the property and business of a partnership composed of the appellant and appellee, and that the consideration for said note had failed in part, owing to the fact that the appellant had agreed to assume all the indebtedness of the partnership, and was to receive all of its assets; the assets and liabilities having been determined from a general statement made by the appellee, who kept the books of the business, to the effect that the assets were \$6,811.15 and the liabilities \$5,448.62, as shown by such books, whereas the assets, in the materials on hand, were short of the stated amount, and the liabil-

Durflinger v. Baker.

ities were greater than as stated. It was alleged that the parties agreed that the books and accounts were correct, and represented the condition of the business, and that as to this the parties were mutually mistaken. The agreement was not alleged to be in writing; nor was reformation sought; nor was fraud alleged; nor did the answer allege that appellant was ignorant of the extent of assets or true liabilities, or that he had no means of knowing the same. The second answer sought to set off one-half of \$300.00 alleged to have been paid to Baker during the partnership by one Steffin, a customer and debtor of the business, and not accounted for by Baker.

The reply, in addition to a paragraph in general denial, alleged that in the dissolution of the partnership, and sale to Durflinger, every matter connected with the business was settled; that appellant assumed all liabilities of the business; and that, in accepting \$600.00, he received less than the value of his interest. The trial resulted in a special finding, conclusions of law, and a judgment against the appellant. The assignment of error is that the court erred—First, in its conclusions of law; second, in overruling the motion for a new trial; and, third, in overruling the motion for a *venire de novo*.

The special findings were that on the 20th day of June, 1895, Durflinger purchased Baker's interest in the partnership business, accounts, and property, and executed to Baker the note in suit; "that at the time of said sale a memorandum of the partnership property, assets, and liabilities was prepared by Baker, as a basis to approximate the value of the same; that both plaintiff and defendant had access to the accounts, books, and property of the partnership at all times; that the negotiation of said sale was on hand for several days, and the price finally agreed upon was a

Durflinger v. Baker.

lump price for the interest of the plaintiff in said partnership, and the defendant took the same subject to all its liabilities, everything in connection with said partnership, as between the plaintiff and defendant, being settled and adjusted at the time of said sale, and embraced in said note sued on." The amount due on the note is stated, the real estate conveyed by Baker is described, and it is found that Baker and one Busby, as a firm, were creditors of one Steffin at a time when Steffin owed Baker and Durflinger, and that Steffin paid to such firm a part of his indebtedness, and then failed in business. The conclusions of law were in favor of the appellee for the amount of the note, interest, and attorney's fees, and for the maintenance of a vendor's lien. In support of the motion for a *venire de novo*, it is claimed only that the court failed to find upon issues tendered by the appellant. Upon a special finding or special verdict, it has many times been held that, if enough is found to support the judgment, the remedy is not by motion for *venire de novo*, because of the rule that the silence of the verdict or finding upon any issue is deemed a finding against the party tendering such issue. *Archibald v. Long*, 144 Ind. 451; *Central Union Tel. Co. v. Fehring*, 146 Ind. 189; *Belshaw v. Chitwood*, 141 Ind. 377. That the facts found support the conclusions of law, and the judgment is not questioned by the appellant, further than to suggest that they contain conclusions. If this suggestion were correct, it would not defeat the findings, unless, when such conclusions were disregarded, enough would not remain to support a judgment. This much is not claimed on behalf of the appellant, nor are the exceptions to the conclusions of law urged. The questions arising upon the motion for a new trial are therefore the only remaining questions. The first inquiry relates to the finding concerning the indebted-

Durflinger v. Baker.

ness of Steffin to Baker and Durflinger, and it is urged that the evidence does not support the finding. That finding is conceded to have been directed to the issue made upon the second paragraph of answer, and the evidence of Baker was that he and one Busby were, during the partnership of Baker and Durflinger, engaged in the business of manufacturing and selling barrel headings, to which business Steffin became indebted at a time when he was also indebted to Baker and Durflinger; that the shipment of headings to Steffin was billed upon the bill heads of Baker and Durflinger; that Steffin made two remittances to the last named firm, the second of which Baker regarded as applicable to the account of Baker and Busby; that he and Durflinger talked of the matter, and it was agreed that said remittance, \$300.00, might be, and the same was, applied to said account. This evidence is contradicted by Durflinger, but it was the privilege of the trial court to determine which of the witnesses testified to the truth, and it is our duty only to find that there was evidence supporting the finding.

The finding above, in quotations, it is earnestly contended, is not supported by, and is contrary to the evidence. This contention rests, in most part, upon a writing introduced in evidence, and bearing the signatures of both parties, and reading as follows:

"June 20, 1895. John W. Durflinger having purchased A. M. Baker's undivided half interest hoop, mill property, stock, book accounts, etc., on following basis:

Stock on hands.....	\$3,390.40
Plant	3,180.00
Book acct. as per ledger.....	240.75
	<hr/>
	\$6,811.15

Durflinger v. Baker.

"Assuming all unsettled accounts as follows:

Bills pay.....	\$5,080.00
Book acct., etc.....	
Overdraft 1st Natl. Bank.....	40.00
Kave and K. called.....	40.00
Longby & Hare acct. and others	25.62
Freights called.....	25.00
Patterson	23.00
Jenkins	75.00
Hare & Sons.....	100.00
Craig interest.....	40.00

\$5,448.62

Net surplus.....\$1,362.53

\$6,811.15

"And in full settlement of Baker's half interest, as shown by surplus, Durflinger executes his note of hand for \$600.00 and agrees to protect Baker from all harm. Mutually agreed to be correct. John W. Durflinger, A. M. Baker."

Baker testified: That negotiations had been pending between the parties, when he offered to sell upon an invoice, or at a "lump sale," for \$700.00. To the latter proposition, Durflinger made a counter proposition of \$500.00; and thereupon they agreed upon \$600.00, the note in suit was executed, a deed was made, and the trade was closed up. Then they agreed to put the above statement upon the book as a final settlement of all differences between them, and after the agreement and sale the statement was written in the book. He testified, also, that the statement was an exhibit of the condition of the firm's business, as appeared from the books of account, and as both parties believed to be true; that an invoice had been made on the first day of May, before; and that a statement from

Durflinger v. Baker.

the books had been made and had been figured over for two days before the "lump sale" was made.

Durflinger's theory was that the written statement was the original and only agreement of sale, and that the note and conveyance were executed pursuant thereto. His evidence tended to support this theory. It will thus be seen that the evidence was in conflict as to the basis of the agreement of the parties; and, unless the contention of appellant's learned counsel shall prevail, that the writing is absolute, and not subject to contradiction by parol evidence, this conflict must be left by us as settled by the trial court.

As we have seen, the writing was not pleaded by either party as directly or collaterally connected with the action or defense; and the agreement pleaded in the first answer would properly be held an oral agreement, with a provision that Durflinger should pay all of the firm debts, and not certain specified debts. So far it would agree with the appellee's theory. But if the written statement was the basis of the appellant's rights, as contended in his behalf, we know of no reason for admitting it without pleading it, either in the form in which it was written, or for enforcement in a reformed condition.

The defense is that he received less than he bargained for, and paid more than he contracted to pay. Either element of this defense sounds in contract, and whether the contract has that effect is a question of law, which should have been presented by the pleadings. The contract, having been in writing, and not pleaded was not in issue. *Church v. Fisher*, 40 Ind. 145; *Galbreath v. McNeily*, 40 Ind. 231; *Ashley v. Foreman*, 85 Ind. 55; *Potts v. Hartman*, 101 Ind. 359; *Mahoney v. Robbins*, 49 Ind. 146. The parties, from their pleadings, both treated the contract, concerning those things entering into the consideration, as in parol.

Cowen v. Failey, Receiver.

There was, therefore, no error in finding upon the oral testimony.

Much is said as to the fact that Baker, a partner, having charge of the books, made the statement or memorandum as to the condition of the business, and upon which the negotiations were made. It is assumed that this fact placed him in such confidential or fiduciary relation to Durfinger as to require exactness of statement, and to hold him responsible for any deviation in amount as to assets or liabilities. The rule sought to be enforced is that which, from the relationship of parties, an unexplained advantage gained by one of the parties is deemed fraudulent.

Aside from the question as to whether constructive fraud is the basis of a remedy in this State, the appellant's allegation is not of fraud, positive or constructive, but is of mutual mistake, and does not come within the rule suggested. The judgment is affirmed.

COWEN v. FAILEY, RECEIVER.

[No. 18,085. Filed February 2, 1898.]

149	382
151	177
149	382
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MUTUAL BENEFIT ASSOCIATION.—Insolvency.—Receiver.—Distribution of Assets to Members Residing in Many States.—Conflict of Laws.—A mutual benefit association with headquarters in the State of Indiana, but doing business through local branches in many states, became insolvent, and a receiver was appointed by an Indiana court to take charge of and wind up the affairs of the association. Local receivers were appointed in the various states where the association had been doing business. Pending settlement the Indiana court, with a view of making a ratable distribution to all members, ordered all branches of the association, and all local receivers to forward to the principal receiver all funds in their hands. An Ohio court refused to comply with the order, but directed the local receiver to distribute among the members of the local branches within his jurisdiction the funds held by him, which was done. Meanwhile the Indiana court issued an order that all local branches and all local receivers should account to the principal receiver, and pay over to him by a certain time, all funds on hand, or be thereafter

Cowan v. Failey, Receiver.

barred from receiving any distribution on the claims represented by them until all others who should have so accounted should first be fully paid. Certain members of the association, within the Ohio court's jurisdiction, appeared in the Indiana court and filed an intervening petition showing that by reason of the order of the Ohio court they could not comply with the requirement of the Indiana court, and asking that the order of the Indiana court be so modified as to allow them to come in and prove their claims, and that the amounts received under the distribution by the Ohio court be charged to them as partial payments. *Held*, that the order of the Indiana court requiring local branches and receivers to account to the principal receiver within a certain time, etc., was nothing more than an interlocutory order, and that the interveners' petition should be granted.

From the Marion Superior Court. *Reversed*.

W. H. H. Miller, J. B. Elam and F. Winter, for appellant.

Harold Taylor, Albert Baker and Edward Daniels, for appellee.

HOWARD, C. J.—This case has grown out of litigation connected with the administration of the affairs of the Order of the Iron Hall, a mutual insurance association. *Supreme Sitting, etc., v. Baker*, 134 Ind. 293; *Schmidt v. Failey*, 148 Ind. 150, 37 L. R. A. 442. The suit was brought by appellant for himself and eighteen hundred other certificate holders of the Order of the Iron Hall, residing in and near the city of Cleveland, Cuyahoga county, Ohio.

It appears that, as required by the constitution and by-laws of the order, eighty per cent. of each insurance assessment was remitted to the head office of the order at Indianapolis. The remaining twenty per cent., though also under control of the central authority, might be, and generally was, retained by the local branches, unless specially called for by the executive officers. The eighty per cent. constituted the benefit fund, and the twenty per cent. the reserve fund.

On the insolvency of the association, and the ap-

pointment of the appellee as receiver for the supreme sitting, an order was issued requiring all branches, and also all local receivers in the different states, to forward to the appellee all funds in their hands, with the view of making ratable distribution to all members entitled thereto. This order or request seems to have been generally complied with; the courts which had appointed local receivers, in most cases, considering this to be the most simple and appropriate method for winding up the affairs of the association. *Durward v. Jewett*, 46 La. Ann. 559, 15 South. 386; *Ware v. Supreme Sitting* (N. J.), 28 Atl. 1041; *Baldwin v. Hosmer*, 101 Mich. 432, 59 N. W. 432. In *Buswell v. Supreme Sitting*, 161 Mass. 224, 36 N. E. 1065, the decision was to the effect that, where there was no question as to conflicting interests of creditors residing in Massachusetts, the fund in that state ought to be forwarded to Indianapolis, where the insolvent estate was in course of administration. A similar decision was rendered in Pennsylvania. *Kean v. Supreme Sitting*, 3 Pa. Dist. Rep. 323. In Connecticut it was held, on the contrary, that the receivers in that state were not required to turn over the funds in their hands to the appellee. *Fawcett v. Supreme Sitting*, 64 Conn. 170, 29 Atl. 614.

In the court of common pleas for the county of Cuyahoga, Ohio, a receiver was appointed for the local branches of the order, of which branches appellant and the other certificate holders whom he represents were members. After much litigation in the Cuyahoga court, including an unsuccessful effort made by appellants to induce the court to order the funds in the hands of its receiver to be paid over to the appellee, that court refused to order the transfer of such funds to the Indiana receiver, but directed its receiver to distribute the same among the members of the local

Cowen v. Failey, Receiver.

branches, which was ultimately done; the certificate holders thus receiving about twenty per cent. upon their claims.

Meanwhile, by order made February 24, 1894, the Marion Superior Court, the court below, in which the principal receivership was pending, directed that all local branches and all receivers who had not already accounted to the appellee and paid over to him the funds in their hands should do so by April 16, 1894, or be thereafter barred from receiving any distribution on the claims represented by them until all others who should have so accounted should first have been fully paid. This order concluded as follows: "The court reserves the right hereafter to alter, amend, or supplement this order as justice may require."

The appellant, being unable, on account of the action of the Cuyahoga court, to comply with the foregoing order, came into the court below on April 16, 1894, with his intervening petition, giving the reasons why he and his associates were unable to comply with the order, and asking that the same might be so modified as to allow them to come in and prove their claims after the distribution should be made in the Cuyahoga court, such distribution in the Cuyahoga court to be charged to them as partial payments on their said claims. No immediate action seems to have been taken on the intervening petition so filed, or upon certain other petitions supplementary thereto, and on October 20, 1894, the appellant filed a second intervening petition, from which it appears that the Cuyahoga receiver had then distributed to appellant and those represented by him about \$50,000.00, being twenty per cent. on their claims, such payments being endorsed on their certificates; that those certificates so endorsed, together with proofs of said claims, had

Cowen v. Failey, Receiver.

been by leave of the Cuyahoga court withdrawn therefrom to be filed with appellee, in order that a balance might by him be allowed thereon, sufficient to make the payments made and to be made to appellant equal to those made and to be made to other certificate holders whose claims had been or were to be audited and paid by this receiver; but that the appellee receiver had refused to recognize or file the claims of appellant and those represented by him, not because they were imperfect or incomplete in any respect, but because the funds thus distributed by the Cuyahoga receiver had not been turned over to this receiver for distribution.

The petition further states, that at the time of filing the original intervening petition, April 16, 1894, at all times since that date, and now, "said receiver, Failey, had and has on hand, undistributed and not appropriated, or required to pay dividends ordered paid upon claims having precedence of membership claims, such as that of this intervening petitioner, and those in like situation, as mentioned in said intervening petitions, a sufficient amount of the funds of the Order of the Iron Hall, held by him as such receiver, to pay all additional dividends that may be necessary to make this intervening petitioner, and those in like situation, as mentioned in said intervening petitions, receive an equal per cent. of their claims with other members of said order." The prayer is that an accounting be had, and that the amount found due on appellant's and other said certificates, after deduction of amounts so allowed and paid in the Ohio court, be allowed and paid, so that appellant, and those in like situation, may receive the same pro rata share as other certificate holders whose claims are allowed and paid by this receiver, and that all orders of the court heretofore made be so modified as to authorize and

Cowen v. Failey, Receiver.

direct the appellee to settle with appellants as if the amounts paid to them in Ohio had been first turned over to this receiver.

To all the intervening and supplemental petitions the court sustained a demurrer. The sole reason for the action of the court seems to have been that the Ohio receiver had failed to comply with the order requiring him to account to appellee before April 16, 1894, and to pay over the money in his hands as receiver of the local branches of Cuyahoga county, in that state.

The order requiring local branches and receivers that desired to participate in the distribution made or to be made in the court below, to account to the appellee, and turn over to him before the date named, all funds in their custody, was unquestionably a proper one to make, and clearly within the discretion of the court. And certainly it cannot be matter of doubt that members of the association, wherever residing, who desired to participate in the distribution, should comply with all proper orders which the court might make in the course of such distribution. This order was necessary for the orderly closing up of the business of the receivership; and if the money in charge of the court and its receiver were, in consequence of such order, distributed to those who had complied therewith, those who had neglected or failed so to comply with such order could have no reason to complain that there were no funds left to apply on their belated claims.

We do not think, however, that the order of the court was anything more than an interlocutory decree, subject to modification by the court at any time. Indeed, the order, by its own terms, professes to be subject to modification at any time, "as justice may require." The record itself shows that at different times,

Cowen v. Failey, Receiver.

in furtherance of equitable settlements with certain local receivers, the time for accounting was extended. On June 7, 1894, time for accounting, as to certain certificate holders, was extended from April 16 to June 30, 1894. So, on June 20, 1894, local branches in Hamilton county, Ohio, were given time for accounting until July 16, 1894, and on June 30, 1894, certain receivers in other states, owing to delays in the courts of those states and other causes, were given time to account until September 30, 1894. As late as February 6, 1895, a settlement made with Maryland receivers was approved. Finally, on May 20, 1895, the court extended the time for accounting on the part of certain branches in Pennsylvania and elsewhere to June 10, 1895. Even, therefore, if such an order as that of February 24, 1894, fixing April 16, 1894, as the limit of time within which accounting with appellee should be had by those wishing to be treated as distributees of the funds in his hands, could in any case be treated as a final order, and not subject to modification, certainly it cannot be so treated here. It does not profess to be such a final order, nor has the court itself so treated it. See *Wilder v. Keeler*, 3 Paige 164; *People v. Remington*, 12 N. Y. Supp. 824; *Grinnell v. Merchants Ins. Co.*, 16 N. J. Eq. 283.

Neither is it a question as to whether it would not have been better if the common pleas court of Cuyahoga county, Ohio, in the spirit of comity, had complied with the request of the Marion Superior Court, and ordered the funds in the hands of its receiver to be turned over to the appellee for distribution. The question is, rather, what should a court of equity do under the circumstances shown in the record? Evidently, the rights of the parties ought to be considered, irrespective of errors or mistakes that may have been heretofore made. The funds in the hands of the

appellee have been, in part, made up of the eighty per cent., or benefit fund assessments paid by appellant and his 1,800 associates; and it is not equitable, so long as the money thus contributed by them yet remains in the custody of the court, to pay it out to other certificate holders. The only reason given for such proposed action is that the Ohio certificate holders have received back the twenty per cent., or reserve fund assessments which they had themselves paid into the funds of the order. Can it make any difference in equity whether they retained this twenty per cent., or first paid it to appellee, in order that he might be able to pay it back to them? The twenty per cent. is accounted for, it is charged to them on their certificates. Ought they not, therefore, to receive, also, their pro rata share of the eighty per cent. benefit fund paid by them, in common with all the other certificate holders of the order?

Of course, appellant, and those represented by him, must fully account for what they have received; and due allowance must also be made for any failure, if any there be, on their part, to pay into the funds of the order any assessments paid by other certificate holders, and also any unnecessary expenses incurred by them in the administration of the funds in Ohio. But, with these deductions made, we are unable to see why any balance in the hands of appellee of funds contributed by appellant, and those for whom he appears, should not be paid to them, quite the same as to other certificate holders. They must fully account to the appellee, quite the same as any other certificate holders, and then receive like payment as to balance due.

Mr. Wharton, in his *Conflict of Laws* (2d ed.), section 624 (a), says: "When there are several distributions opened in separate states, a creditor who has ob-

Cowen v. Failey, Receiver.

tained a dividend in one of these distributions must account for it when claiming a dividend in another distribution. He will only be entitled to as much as brings him on an equality with other creditors." See, also, Wharton on Conflict of Laws, section 798. This text is well supported in decided cases. *Ex parte Banco De Portugal*, L. R. 11 Ch. Div. 317; *Ex parte Wilson*, L. R. 7 Ch. App. 490; *In re Bugbee*, 9 Nat'l Bank Reg. 258; *Tyler v. Thompson*, 44 Tex. 497; *Hays v. Cecil*, 16 Lea (Tenn.) 160; *Loomis v. Farnum*, 14 N. H. 119. In this jurisdiction, also, a nonresident petitioner was not allowed to share in a fund in the hands of a fiduciary until it should first be made to appear what amount, if any, he should recover on his claim out of proceeds of property of the same estate attached by him in his own jurisdiction. *Combs v. Union Trust Co.*, 146 Ind. 688.

While appellant and his associates are not creditors, in the strict sense of the term, but rather members of an association, with right to their distributive shares of a fund created by them in common with other members; yet the foregoing authorities, in analagous cases, make it clear that their right to a pro rata distribution was not wholly cut off by their neglect to comply with the reasonable order of the court requiring them to account to the appellee and pay over to him the funds in their hands on April 16, 1894.

The judgment is reversed, with instructions to overrule the demurrer of appellee to the intervening petitions of appellant, and for further proceedings.

Thomas v. Thompson.

THOMAS v. THOMPSON.

[No. 18,861. Filed February 2, 1898.]

FORMER ADJUDICATION.—*Judgment.—Collateral Attack.—Estoppel.*—

A devisee of real estate, who, after obtaining a decree partitioning and quieting title thereto, is made defendant in an action brought by the administrator of the devisor to sell such real estate for the payment of debts and the widow's claims, to which proceedings she pleaded the former suit and was defeated and abided the judgment of the court without appeal, is estopped from attacking in a collateral proceeding against the purchaser, the order of sale made therein.

From the Grant Circuit Court. *Affirmed.*

Steele & Baker, Brownlee & Baker and G. W. Gibson, for appellant.

G. A. Henry and P. H. Elliott, for appellee.

JORDAN, J.—Action in ejectment by appellant to recover possession of certain real estate, of which she claimed to be the owner and entitled to possession. There was a judgment in favor of appellee, from which this appeal is prosecuted. Both parties claim title to the land in dispute through one William Weaver, appellant, as a legatee under his will; and appellee, by purchase at a sale made by the administrator of the estate of said Weaver. The following appear to be the material facts established by the evidence: By the last will of said William Weaver, all of his property, after the payment of his debts, was devised to the appellant and one Tabitha Weaver, both of whom were the granddaughters of the testator. The will was probated in the Grant Circuit Court in 1879. The testator left surviving him a widow, but made no provisions for her in his will. Subsequently, in 1894, Tabitha Weaver, one of the legatees, having died, leaving heirs, appellant instituted an action in the Grant Circuit Court against these heirs and Matilda Weaver,

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Thomas v. Thompson.

widow of the testator, for partition of the real estate claimed by her under the will, and to quiet her title thereto. Such proceedings were had in this action as resulted in the appellant's undivided moiety in the land being partitioned, and in a decree quieting her title to it. After the partition was made, John H. Weaver was, in 1894, by the Grant Circuit Court, appointed, and qualified as administrator of the estate of William Weaver, deceased, with the will annexed; and thereupon, as such administrator, he filed his petition in that court to secure an order for the sale of the land in controversy, along with other lands, for the payment of costs and other expenses of the estate, and also for the payment of the \$500.00 allowed under the statutes to the widow, Matilda Weaver. Appellant and all others claiming an interest in the real estate were made defendants by the administrator to this petition. Appellant appeared to the action, filed an answer in denial, and also set up affirmative matter, and resisted the administrator in his efforts to obtain an order for the sale of the land, for the purpose, as averred, of making assets thereof to pay said claims. A trial resulted in the court granting the prayer of the administrator, and the land was ordered to be sold; and with this order the administrator complied and sold it to the appellee, pursuant to the court's order. The sale was reported to the court, and duly confirmed, deed of conveyance ordered and executed.

Counsel for appellant seem to base the right of their client to recover in this cause, on the ground that the judgment of the court quieting her title to the land in the partition proceedings gave her a good and sufficient title to the same; that the appointment of an administrator, and the proceedings to sell the land by him, after the judgment in the partition suit had been

Thomas v. Thompson.

rendered, were invalid, for the reason that more than fifteen years had passed since the death of the testator before the appointment of the administrator was made, and the action to sell the realty was instituted. Consequently, they insist that the application for letters of administration, and likewise the proceeding to sell the land, were barred by the statute of limitation, and also the claim of the widow for the \$500.00, and therefore the appellant is not bound by the order of sale. Counsel for the appellee contend that the judgment of the court authorizing the sale of the land in dispute to pay the claims of the estate of William Weaver, to which appellant was a party, conclusively estops and bars her from asserting, as against the appellee, who purchased thereunder, any title to said realty.

It appears from an inspection of the pleadings filed in the action instituted by the administrator to sell the premises, that under the petition of the latter, and answer of appellant therein, the former proceedings in the partition suit, and also the validity of the widow's demand of \$500.00 were expressly put in issue. Appellant, however, was not successful in defeating the action; and the court seemingly decided all of the issues against her, by awarding the order for the sale of the land. The petition of the administrator apparently proceeded upon the theory that the real estate sought to be sold still belonged to the estate of William Weaver, at least, so far as it was required to pay the claims and expenses therein mentioned, notwithstanding the fact that it had been devised to the appellant, and also assigned to her in the action for partition. This issue the petition tendered, and upon this issue the court decided in favor of the administrator. There is no question as to the jurisdiction of the court, in the proceedings to sell the land, over both

Thomas v. Thompson.

the subject-matter and the appellant as a party thereto. She having been content to abide by the judgment rendered therein, is not now in a position to assail it as erroneous; for it must be conceded, if the court had the power to decide at all, it was consequently vested with the power to decide wrong as well as right. This principle is settled by many decisions of this court. The judgment in the partition suit by which her title was quieted, as stated, can in no sense be available to support her claim that she has a better title than has appellee. The court, by the order subsequently made, authorizing the land to be sold by the administrator as the property of William Weaver, deceased, to discharge the claims against his estate, must be deemed to have considered the former judgment as no bar to its order. The rule asserted is that the last judgment is always conclusive that no cause existed why it should not be rendered. *Van Fleet's Collateral Attack*, section 862. That the order of sale through which appellee claims to own the realty in controversy, under the circumstances, is not open to a collateral attack, and conclusively estops and precludes appellant in this action, is a proposition firmly settled. *Lantz v. Maffett*, 102 Ind. 23; *Craighead v. Dalton*, 105 Ind. 72; *Marquis v. Davis*, 113 Ind. 219; *Spaulding v. Baldwin*, 31 Ind. 376; *Dowell v. Lahr*, 97 Ind. 146; *Boyer v. Robertson*, ante, 74; *Black on Judgments*, section 246.

Judgment affirmed.

Shields v. The State.

SHIELDS v. THE STATE.

[No. 17,789. Filed February 8, 1897.]

JURY.—Qualification of Jurors.—Examination.—Question of Fact.—

The Supreme Court will not interfere with the determination of the trial court of the question concerning the qualification of jurors involving questions of fact, merely because the answers of the juror are, or seem to be, inconsistent or incoherent. pp. 397-399.

SAME.—Qualifications of Jurors.—Examination.—Exceptions.—

Criminal Law.—To present properly any question as to the qualifications of a juror to sit in a criminal cause, some one or more of the statutory causes provided by section 1862, Burns' R. S. 1884 (1798, Horner's R. S. 1897), must be stated to the trial court; an objection stated in general is properly overruled. pp. 398-400.

WITNESSES.—Cross-Examination.—Discretion of Court.—

The extent to which the cross-examination of a witness may be carried rests within the discretion of the trial court, and the Supreme Court will not interfere therewith, on appeal, unless a clear abuse of such discretion is shown. pp. 401, 402.

CRIMINAL LAW.—Evidence.—Hearsay.—

A person injured, whether living or dead, is not a party to a criminal prosecution therefor, and his admissions and statements are not evidence, either for or against the accused, unless of the *res gestae*, dying declarations, or threats; but are hearsay, the same as those of any other third person. pp. 402-404.

INSTRUCTIONS.—Criminal Law.—Harmless Error.—Homicide.—

Errors committed in giving or refusing to give instructions concerning the offense of murder in the first and second degree, in the trial of a criminal cause, were harmless where the defendant was convicted of manslaughter. p. 404.

SAME.—Criminal Law.—Manslaughter.—

An instruction that if the jury found from the evidence, beyond a reasonable doubt, that defendant, without malice, express or implied, and without premeditation, but voluntarily, upon a sudden heat took the life of deceased, in manner and form as charged in the indictment, they should find him guilty of voluntary manslaughter is not bad for failure to use the word unlawfully before the word took, where the indictment charged that defendant unlawfully, feloniously, and purposely killed and murdered deceased. p. 405.

SAME.—Criminal Law.—Assault and Battery.—

An instruction in the trial of a cause of an assault and battery with intent to commit murder is not bad for failure of the court to use the word unlawful in referring to the touching of deceased by defendant, where the ele-

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151	259
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151	670
152	38
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153	379
149	395
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157	215
157	444
149	395
160	455
149	395
161	42
161	295
149	395
163	490
149	395
164	270
149	395
165	183
165	536
165	609
149	395
169	501
169	502
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Shields v. The State.

ments stated therein were such that when applied to the evidence and construed with the other instructions as a whole, the jury were not misled as to the essential elements of the offense of assault and battery. *pp. 405, 406.*

INSTRUCTIONS.—*Must Be Considered Together.*—Instructions are considered as an entirety, and not separately or in dissected parts, and even if some particular instruction, or some portion of an instruction, standing alone or taken abstractly, and not explained or qualified by others, be erroneous, it will afford no grounds for reversal. *p. 406.*

SAME.—*Inaccuracies.—Technical Errors.*—Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no grounds for reversal, when they result in no substantial harm to the complaining party, if the instructions, taken together, correctly state the law applicable to the facts of the case. *pp. 406-410.*

SAME.—*Erroneous Instruction.—Harmless Error.*—The giving of an erroneous instruction is not reversible error when it appears that the substantial rights of the complaining party were not prejudiced thereby. *pp. 410, 411.*

SAME.—*As to Character of Accused.—Criminal Law.*—An instruction to the effect that in doubtful cases evidence of good character is conclusive in favor of the party accused of the crime is improper, as under the law the jury are the exclusive judges of the facts and of the credibility of the witnesses, and if they have a reasonable doubt of the guilt of the accused he must be acquitted whether there is any evidence of his good character or not. *p. 411.*

SAME.—*Numbering and Signing.*—It is the duty of the trial judge, under section 1892, Burns' R. S. 1894 (1828, Horner's R. S. 1897), to number and sign instructions given by him in the trial of a cause, yet a failure to do so will not authorize the reversal of the cause. *pp. 411, 412.*

EVIDENCE.—*Weight Of.—Conflicting Evidence.—Criminal Law.*—Where in the trial of a criminal cause there was evidence given sustaining every material allegation in the indictment the Supreme Court will not reverse the cause because of conflicts therein upon some points. *p. 412.*

CRIMINAL LAW.—*Excessive Punishment.—Constitutional Law.*—The provisions of section 18, article 1 of the constitution that cruel and unusual punishments shall not be inflicted, has reference to the statute fixing the punishment, and not to the punishment assessed by the jury within the limits fixed by the statute. *pp. 412, 413.*

From the Blackford Circuit Court. *Affirmed.*

John Cantwell, S. W. Cantwell and L. B. Simmons,
for appellant.

W. A. Ketcham, Attorney-General, Elmer E. Stevenson, Merrill Moores and Jay A. Hindman, for State.

MONKS, J.—Appellant was convicted of the crime of manslaughter upon an indictment charging him with murder in the first degree, in the killing of James Young. The only error assigned calls in question the action of the court in overruling the motion for a new trial.

One Harvey Ward, being called as a juror, was examined upon oath as to his qualifications to serve as a juror. He stated that he had formed and expressed an opinion as to the guilt or innocence of the appellant; that his opinion was formed from talking with his neighbors about the case, and he had read something about it in the newspapers; and that all he had heard was rumor, and from that he had formed his opinion; and that it would require some evidence to remove the opinion. During the early part of the examination he said that he did not believe that he felt able to render a fair and impartial verdict in the case according to the law and evidence, notwithstanding the opinion he had formed. At a later period of his examination he said he believed, notwithstanding the opinion he had formed, that he could try the case, and render a fair and impartial verdict on the law and the evidence. Afterwards, during the latter part of the examination, it is claimed by appellant that the juror said that he guessed he did not understand the question in regard to his ability to render a fair and impartial verdict according to the law and the evidence, which he had answered in the affirmative. At the close of the examination, appellant challenged the juror, and stated as the ground of challenge, "that he was not competent to serve upon said jury," which objection was overruled, and said Ward was afterwards sworn as a juror. Appellant insists that this ruling of the court

Shields v. The State.

was prejudicial error, although appellant had not exhausted his peremptory challenges, citing *Brown v. State*, 70 Ind. 576. This question was decided the other way by this court in *Woods v. State*, 134 Ind. 35. And in *Siberry v. State*, *post*, 684, this court followed *Woods v. State*, *supra*, and *Brown v. State*, *supra*, and *Fletcher v. Crist*, 139 Ind. 121, were expressly overruled on this point. We are of the opinion, however, that no error was committed by the court in overruling appellant's challenge to said juror.

The statute provides eleven causes for challenge to persons called as jurors, one of which is that he has formed or expressed an opinion as to the guilt or innocence of the defendant. It is provided, however, that if the person called as a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, that if it appear from the examination of the juror that such opinion is founded upon reading newspapers, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction or reading reports of their testimony, or hearing them testify, and the juror shall state upon oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial, and shall render such verdict, may, in its discretion, admit him as a juror to serve in such case. Section 1862, Burns' R. S. 1894 (1793, Horner's R. S. 1897). Under this section a question of fact was submitted to the trial court for its determination. It was shown that the opinion of the juror was based on rumors and newspaper accounts and hearsay. The juror said that, notwithstanding the opinion he had formed, he believed he could render a fair and impartial verdict upon the law and the evidence. There were some inconsistent answers to questions propounded. There

Shields v. The State.

was nothing to show any bias or feeling on the part of the juror against the appellant or his defense.

It was within the power of appellant, by further examination of the juror, to have made clear to any one examining the record whether the juror did or did not understand the question as claimed by appellant. This was not done, and the trial court determined that question. The answers of the juror raised questions for the decision of the court, who saw the juror, his appearance, demeanor, manner, and conduct, and heard his answers, his voice and its tone; and from these he was very much better able to determine the meaning of the juror than any one who merely reads the questions and answers after they are reduced to writing. What may appear uncertain or indefinite to one reading the record may have been plain and clear to one who heard the examination of the juror, and saw his manner and conduct during such examination. For this reason this court cannot interfere with the determination of the trial court of the question concerning the qualifications of jurors, merely because the answers of the juror are or seem to be inconsistent or incoherent.

It was said by this court in *Walker v. State*, 102 Ind. 502, on p. 505: "Persons called to serve as jurors are often confused by the incisive and inquisitorial nature of the questions addressed to them touching their qualifications to act in that capacity, and, under a confusion thus induced, frequently give inconsistent, and even incoherent, answers. It is consequently, both just and reasonable that the judge who presides at the trial should be permitted to exercise large discretion in determining the weight and relative importance given to such answers."

In *Guetig v. State*, 66 Ind. 94, which was decided before the enactment of the present statute, which

Shields v. The State.

gives the court a larger discretion, this court in speaking of the influence of rumors and hearsay evidence upon the mind of a juror, said: "In the case before us the qualified opinion of each juror objected to was formed upon hearsay evidence or newspaper reports, not upon facts known to the juror, and was evidently of a character that would readily yield to the contrary evidence. It does not seem probable to us that it could have affected the opinion of the juror with all the evidence before him in the case."

The trial court found, upon the evidence submitted that the juror was impartial, and would render a fair and impartial verdict upon the law and the evidence, and, in its discretion, admitted him as a juror, and we cannot say that the trial court abused the discretion conferred by the statute. The objection to the juror was properly overruled for another reason. Section 1862, Burns' R. S. 1894 (1793, Horner's R. S. 1897), sets out eleven distinct and separate causes for challenge to any person called as a juror in any criminal trial, and provides that there shall be no other cause for challenge. The cause of challenge stated was general and no one of the eleven statutory causes was pointed out to the court as being the one upon which appellant relied. It is well settled that all objections stated to the court must be specific and certain and not general. Elliott App. Proc., sections 293, 769, 770 and 771. To present properly any question as to the qualifications of the juror to sit in said cause, some one or more of the statutory causes should have been stated to the court. This much was due the trial court and the adverse party, and is necessary to the proper administration of justice. Elliott App. Proc., sections 769, 770; *People v. Walsh*, 43 Cal. 447; *People v. Renfrow*, 41 Cal. 37; *People v. McGungill*, 41 Cal. 429; *People v. Reynolds*, 16 Cal. 128.

Shields v. The State.

The next specification for a new trial is that the court erred in permitting the State to cross-examine Dr. Robinson, a witness for appellant, as an expert, when he had not been examined as such by appellant. Dr. Robinson testified in chief that he had been practicing as a physician and surgeon eighteen years; that, before the death of Young, he had attended him as a physician, and treated him for quinsy or tonsillitis; he testified as to his examination and medical treatment of Young, the nature of his sickness, his symptoms, the characteristics of quinsy or tonsillitis, what suppuration is, the prescription of chloral, the condition of Young's throat, the examination he made to determine whether Young was dead, the postmortem examination, the appearance and condition of the neck and throat of Young shown by the postmortem examination which he made at the request of the coroner, a description of the thorax, the meaning of congestion, a description of arterial and pulmonary blood and the difference between them, the pulmonary circulation, the condition of the heart with all its cavities, and whether the heart was of normal size, the condition of the stomach, the condition of the bowels, that they were healthy, the usual smell of a dead body, the color and condition of the throat, and that it had the color and characteristics of a healthy throat.

The examination of Dr. Robinson by appellant shows clearly that he was examined, not only as to his knowledge of the facts of the case, but also as a medical expert, the State therefore was entitled to cross-examine him as such, not only concerning the facts testified in chief, but to test his skill and knowledge as an expert. *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409, 414, 415, 417, 421.

Shields v. The State.

If said witness was unable to sustain himself on cross-examination, and the jury were convinced thereby that he was an ignoramus, as insisted by appellant, this would not deprive the State of its right to cross-examine him. If the cross-examination did convince the jury that said witness possessed no skill or knowledge as a physician, and he had not testified as an expert, as insisted by appellant, then appellant was not harmed, because such cross-examination only affected his credibility as an expert witness, and not his credibility as an ordinary witness.

The cross-examination of witnesses, and the extent to which it may be carried necessarily rests in the discretion of the trial court, with which this court can not interfere, unless a clear abuse of such discretion is shown. *Wachstetter v. State*, 99 Ind. 290, 295; *Ledford v. Ledford*, 95 Ind. 283, 285; *Bessette v. State*, 101 Ind. 85, 88; *Hinchcliffe v. Koontz*, 121 Ind. 422, 425; *Boyle v. State*, 105 Ind. 469, 475. We cannot say that there was an abuse of that discretion in this case.

During the progress of the trial, appellant propounded certain questions to one of his witnesses, to which objections were sustained by the court. Appellant thereupon offered to prove by said witness that he had seen the deceased take a large quantity of chloral once in May, 1894, and that he had seen him take chloral once in July, 1894; that the deceased had in May, 1894, stated to the witness that he, the deceased, was addicted to the use of hydrate of chloral, and had fainting spells; and that he made substantially the same statement to the witness in July, 1894. Appellant also stated that he would prove by other witnesses that hydrate of chloral, when taken by a person, is not cast out of the system, but is retained and accumulates in the system. The foregoing evidence which was offered, would have been responsive to said questions.

Shields v. The State.

James Young had been seriously ill with quinsy for several weeks, and his throat had suppurated, was very sore and very much inflamed, almost stopping up his throat, and he had, among other medicines, been taking hydrate of chloral. While in this condition, on the night of October 23, 1894, he and appellant had a difficulty; and it is the theory of the State that appellant seized the deceased by the throat with his right hand, the thumb on one side of the throat, and the fingers on the other, pressing them toward each other and back, while he placed his left hand on the back of the neck of the deceased and pressed forward, and that by reason of this pressure death resulted. On the other hand, two of the contentions of appellant were that the death of Young was caused by the use of hydrate of chloral, and not by anything that he did, and that what he did was done in exercise of his right of self-defense.

It was shown by the evidence that the deceased had been taking chloral for several weeks before his death, and there was evidence tending to prove that he had taken much more than had been prescribed by his physician; but there was no evidence given or offered that showed or tended to show that hydrate of chloral taken by Young in May and July, 1894, had or could have had anything to do with his death, on October 23, 1894. Moreover, said statements of the deceased made in May and July, 1894, were merely hearsay, and incompetent for that reason. It is well settled that the person injured, whether living or dead, is not a party to the prosecution, and his admissions and statements are not evidence either for or against the accused, unless of the *res gestae*, dying declarations, or threats, but are hearsay, the same as those of any other third person. *Williams v. State*, 52 Ala. 411; *Moses v. State*, 88 Ala. 78, 7 South. 101, 16 Am. St. 21,

Shields v. The State.

and note; *Commonwealth v. Densmore*, 94 Mass. 535; *Commonwealth v. Sanders* (Mass.), 14 Gray 394, 77 Am. Dec. 335; *People v. McLaughlin*, 44 Cal. 435; *People v. McCrea*, 32 Cal. 98, 100; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *State v. Maitremme*, 14 La. Ann. 830; *Hauk v. State*, 148 Ind. 238, and cases cited; 2 Bishop's Crim. Proc., section 632; 1 Bishop's Crim. Proc., section 1248; Wharton's Crim. Ev., section 225; Gillett's Indirect and Collateral Ev., sections 229, 230.

Appellant claims that said admissions were admissible under the doctrine concerning uncommunicated threats, declared in *Holler v. State*, 37 Ind. 57; *Wood v. State*, 92 Ind. 269; *Boyle v. State*, 97 Ind. 322; *Leverich v. State*, 105 Ind. 277. All that is decided in the cases cited upon the point mentioned is, as said in *Leverich v. State*, *supra*, that "Evidence that the deceased, or prosecuting witness, attacked the defendant being first introduced, proof of previous threats by him is admissible upon the ground that such threats may tend to illustrate the character of the attack thus made, although never communicated to the defendant." This doctrine has no application to the evidence offered in this case.

The court did not err, therefore, in sustaining the objections of the State to the introduction of said evidence.

It is next insisted that the court erred in giving certain instructions of its own motion, and in refusing to give certain instructions requested by appellant. A number of the instructions given, and a number of those refused were concerning the offense of murder in the first and second degrees; but errors, if any were committed, in giving or refusing such instructions, were harmless, for the reason that appellant was found not guilty of murder in the first or second degree.

Shields v. The State.

The court instructed the jury that if they found from the evidence beyond a reasonable doubt that appellant, in the county of Blackford and State of Indiana, without malice express or implied, and without premeditation, but voluntarily, upon a sudden heat, took the life of James Young, in manner and form as charged in the indictment, they should find him guilty of voluntary manslaughter. The objection urged to this instruction is that the word "unlawfully" was not used before the word "took" in the instruction. It was charged in the indictment, among other things, that appellant unlawfully, feloniously, and purposely killed and murdered James Young, setting out the means used. Under such instruction it is evident that the jury could not find appellant guilty of voluntary manslaughter, without finding that he unlawfully, feloniously, and purposely took the life of said Young. The instruction was not open, therefore, to the objection urged.

In two of the instructions the court, in speaking of the offense of involuntary manslaughter, and what acts, if perpetrated by appellant, and the death of the deceased was caused thereby, would constitute that offense, did not use the word "unlawful" in connection with the words "touch" and "touching." It is insisted by appellant that this was error, for the reason that, unless an indictment for assault and battery alleges that the touching was unlawful, it is not sufficient. It is true, as urged by appellant, that, to constitute the offense of assault and battery, the touching must be unlawful, and the indictment therefore to be sufficient, must allege that fact. It is not required, however, that an offense be charged in the language of the statute. It is sufficient if the same is charged in words importing the same meaning. *Chandler v. State*, 141 Ind. 106, 113-116, and cases

Shields v. The State.

cited. It was not necessary for the court to use the word "unlawful" in said instructions if the elements stated were such that, when applied to the evidence and construed with the other instructions as a whole, the jury were not misled as to the essential elements of the offense of assault and battery.

It is settled law in this State that instructions are considered with reference to each other, and as an entirety, and not separately or in dissected parts; and if the instructions as a whole correctly and fairly present the law to the jury, even if some particular instruction, or some portion of an instruction, standing alone or taken abstractly, and not explained or qualified by others, may be erroneous, it will afford no grounds for reversal. *Cooper v. State*, 120 Ind. 377, 380, 381; *Boyle v. State*, 105 Ind. 469, 476; *Deilks v. State*, 141 Ind. 23; *Brown v. State*, 105 Ind. 385, 391; *Colee v. State*, 75 Ind. 511, 515; *Rauck v. State*, 110 Ind. 384, 390; *Kennedy v. State*, 107 Ind. 144, 149; *Epps v. State*, 102 Ind. 539, 553; *Gallaher v. State*, 101 Ind. 411, 412; *Story v. State*, 99 Ind. 413, 414; *Barnett v. State*, 100 Ind. 171, 176; *McDermott v. State*, 89 Ind. 187, 193; *Goodwin v. State*, 96 Ind. 550, 559; *Garber v. State*, 94 Ind. 219; *Hall v. State*, 8 Ind. 439, 450; *Craig v. Frazier*, 127 Ind. 286, 287; *Staser v. Hogan*, 120 Ind. 207, 225, 226; *Union Life Ins. Co. v. Buchanan*, 100 Ind. 63, 74; *Atkinson v. Dailey*, 107 Ind. 117; *Lytton v. Baird*, 95 Ind. 349, 351, 353; *Western Union Tel. Co. v. Young*, 93 Ind. 118; *Eggleston v. Castle*, 42 Ind. 531; *Mitchell v. Allison*, 29 Ind. 43; *Shaw v. Saum*, 9 Ind. 517; *Newport v. State*, 140 Ind. 299.

Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no grounds for reversal, when they re-

Shields v. The State.

result in no substantial harm to the defendant, if the instructions, taken together, correctly state the law applicable to the facts of the case. *Stout v. State*, 90 Ind. 1, 14; *Brown v. State*, *supra*. Nor is the giving of an erroneous instruction reversible error when it appears that the substantial rights of the defendant were not prejudiced thereby. *Stewart v. State*, 111 Ind. 554, 560; *Hall v. State*, *supra*. The foregoing rules apply to criminal as well as civil cases. *Story v. State*, *supra*.

In *Cooper v. State*, *supra*, the trial court in defining the offense of voluntary manslaughter had omitted the word "voluntary," but in other respects the definition followed the statute literally. This court said in that case: "It is not perceived how the defendant could have been prejudiced by the omission of this word. Besides, the omitted word was in effect supplied in an instruction subsequently given.

"The rule is firmly established that if, upon considering all the instructions together, it fairly appears that the law was stated with substantial accuracy, so that the jury could not have been misled, no ground for reversal is presented, even though a particular instruction, or some detached portion thereof, may not be precisely accurate."

In *Boyle v. State*, *supra*, this court said: "We have again and again decided that instructions are not to be disposed of by a process of dissection, but are to be taken as a whole. It would be unreasonable to expect that one instruction should cover an entire case, or that the jury should take the law from one of a series of instructions. Where an instruction stands alone upon a material point, neither explained nor qualified by any others, then it might with reason be affirmed that if it erroneously expressed the law there should be a reversal, but where it forms one of a series bearing on a given question, and, taking the entire series

Shields v. The State.

together, the law is correctly stated to the jury, it is otherwise."

In *Atkinson v. Dailey*, *supra*, the court gave an instruction that the plaintiff was entitled to recover on making certain proof, ignoring the defense set up by the defendant. In a subsequent instruction, the court presented the law of the case as applicable to the defense set up; and this court said that, construing both instructions together, the jury were not misled, but must have understood the rights of plaintiff and defendant under the pleading.

Under the facts of this case, if appellant choked the deceased, such act was unlawful, unless done in self defense. If the act of choking was not done in self defense, and the same caused the death of Young, then appellant was guilty at least of involuntary manslaughter. The jury were fully instructed as to the law of self defense, and fully understood therefrom that if appellant choked the deceased in the exercise of his right of self defense, and thereby caused the death of deceased, he was justified in so doing, and was not guilty of any offense. Said instructions, when considered together, correctly stated the law applicable to the facts of this case; and the cases of *Hunter v. State*, 101 Ind. 241; *Bird v. State*, 107 Ind. 154, and *Snyder v. State*, 59 Ind. 105, cited by appellant, are not in point here.

The jury were instructed that "involuntary manslaughter is committed when a person unlawfully kills another human being involuntarily, without malice, expressed or implied, but in the commission of some unlawful act," and that if they "believed from the evidence, beyond a reasonable doubt, that the defendant unlawfully committed an assault and battery upon James Young, without any intention or purpose to kill him, and that the death of said Young resulted

from said assault and battery, you should find the defendant guilty of involuntary manslaughter." The statute defining the offense, and stating its constituent elements, was also given to the jury. They were fully informed as to the essential elements constituting the offense of voluntary manslaughter, and were informed as to the difference between voluntary and involuntary manslaughter. They were also informed that any unlawful touching of another in a rude, insolent, or angry manner was an assault and battery. It is clear, therefore, that the jury could not have been misled by the failure to use the word "unlawful" in said instructions in connection with the words "touched" and "touching."

In one instruction the court informed the jury, among other things, that under the indictment, they might find the appellant guilty of manslaughter. Appellant complains of this instruction, because the court did not say that the jury might find the appellant guilty of manslaughter "if the evidence warrants it." In another instruction the jury were informed that, under the indictment, they might find the appellant guilty of murder in the first degree, murder in the second degree, or manslaughter, "if the evidence warrants it." The jury were also instructed that, before the appellant could be convicted of any offense charged in the indictment, his guilt of such offense must be established by the evidence beyond a reasonable doubt, and, if the jury had a reasonable doubt of his guilt, they should acquit him.

In *Deilks v. State, supra*, it was held by this court that it was no objection to an instruction defining what must be proved in order to find the accused guilty of the offense charged, that it used the phrase, "if you believe" instead of "if you believe beyond a reasonable doubt," if the court has in other instructions

fully informed the jury that the defendant can only be found guilty when his guilt is established beyond a reasonable doubt. It follows, therefore, under the established rule that the instructions are to be considered as a whole, that said instruction, when so considered, was not erroneous.

The court gave an instruction in regard to the proof of facts by inference from other facts and circumstances in evidence, and the objection urged thereto by appellant is, that "it told the jury to convict if the State had proved its case by a preponderance of the evidence." The instruction upon the subject of reasonable doubt was in the language used in *Stout v. State, supra*, on p. 12.

The court also gave the following instruction: "The defendant is presumed to be innocent until proven guilty beyond a reasonable doubt; and this presumption prevails until the close of the trial, and you should weigh the evidence in the light of this presumption, and it should be your duty to reconcile all the evidence in the light of this presumption if you can."

It is evident that the jury could not have understood from the instruction objected to, considered in connection with the other instructions that they could find appellant guilty upon a mere preponderance of the evidence.

While the instruction complained of is not to be commended as a model, and should not have been given on account of its ambiguity, yet when considered in connection with the other instructions, as is required under the well settled rule, it is clear that the law was correctly stated upon the subject of reasonable doubt, and the jury could not have been misled by said instruction.

The court gave an instruction in regard to the rights and duties of the jury in weighing the evidence of any

Shields v. The State.

witness whom the jury may find to have been impeached, or who has willfully and falsely testified concerning any matter or thing material to the issues in the cause. Appellant objects to this instruction, not because it contains an erroneous statement of the law, but because there was no evidence to which the same was applicable. It is not necessary for us to determine whether it was applicable to the evidence or not, for the reason that, if it was not, no inference injurious to appellant could be drawn therefrom, and therefore it could not have prejudiced the substantial right of the appellant, and was therefore harmless. *Stockton v. Stockton*, 73 Ind. 510, 513, 514; *Mode v. Beasley*, 143 Ind. 306, 331, 332, 335.

It is next urged that the court erred in refusing to give instruction eighteen, requested by appellant. This instruction informs the jury that in doubtful cases evidence of good character is conclusive in favor of the party accused of crime. Under our law the jury are the exclusive judges of the facts and of the credibility of the witnesses, and if they have a reasonable doubt of the guilt of the accused he must be acquitted, whether there is any evidence of his good character or not. The instruction refused was not a correct statement of the law, and was properly refused.

The substance of instructions twenty-three, twenty-four, and twenty-five, requested by appellant, was embraced in the instructions given by the court, and for that reason there was no error in the refusal to give them.

The instructions given by the court of its own motion were not numbered and signed, as required by the fifth clause of section 1892, Burns' R. S. 1894 (1823, Horner's R. S. 1897), and this is assigned as a cause for a new trial. Under the statute, it was the duty of the trial judge to number and sign the instructions given

Shields v. The State.

by him. His failure to comply with the statute has imposed much extra labor upon counsel and this court. While trial judges should be careful to comply with the statute, and number and sign instructions given, as required, and thus materially lessen the labor of counsel and this court on appeal, yet the failure to do so does not authorize the reversal of a cause. Section 1964, Burns' R. S. 1894 (1891, Horner's R. S. 1897), provides that, in the consideration of questions on appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action in the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant. The failure of the trial court to number and sign the instructions given, as required by the statute, did not prejudice appellant in his substantial rights, and therefore furnishes no ground for reversal.

It is urged that the verdict is contrary to law and the evidence. There was evidence given at the trial sustaining every material allegation in the indictment, and, although there was conflict upon some points, we are not authorized to reverse the cause for that reason. *Deilks v. State, supra*; *Livingston v. State*, 141 Ind. 131, 132, 133; *Deal v. State*, 140 Ind. 354; *Hire v. State*, 144 Ind. 359; *Lankford v. State*, 144 Ind. 428, 434; *Robb v. State*, 144 Ind. 569, 570; *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449, 456.

It is also urged as a reason for reversal that the punishment is excessive. The only limitations to the power of the legislature to fix the punishment for crimes are those imposed by the constitution of this State and the United States. Section sixteen of article one of the constitution of this State, which provides that cruel and unusual punishments shall not be inflicted, has reference to the statute fixing the punishment, and not to the punishment assessed by the jury

Sheffer et al. v. Hines.

within the limits fixed by the statute. If the statute fixing the punishment is not in violation of said section of the constitution, then any punishment assessed by a court or jury within the limits fixed by the statute cannot be adjudged excessive by this court, for the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but is a legislative power, controlled only by the provisions of the constitution. *Ledgerwood v. State*, 134 Ind. 81, 91; *Murphy v. State*, 87 Ind. 579, 580, 581; *McCulley v. State*, 62 Ind. 428, 436; Gillett's Crim. Law, section 35.

Finding no available error in the record the judgment is affirmed.

SHEFFER ET AL. v. HINES.

[No. 18,265. Filed February 3, 1898.]

PLEADING.—Complaint.—*Action to Set Aside Conveyance of Real Estate.*—*Description.*—A complaint, in an action to set aside the conveyance of real estate as fraudulent, which fails to describe the real estate with such certainty that when carried into the decree the judgment of the court would become effective without extraneous evidence, is bad. pp. 413, 414.

SAME.—Amendments Deemed to Have Been Made After Verdict.—Section 670, Burns' R. S. 1894, under which amendments to pleadings for any defect in form are deemed to have been made, does not apply to matters of substance which have been omitted. p. 414.

From the Jay Circuit Court. *Reversed.*

James J. Moran, W. H. Williamson, and J. F. Denney, for appellants.

Thomas Bosworth, for appellee.

HACKNEY, J.—This was a suit by the appellee against the appellants to set aside as fraudulent the conveyance of lands the description of which, given in the complaint was by the numbers of the sections, town-

Sheffer et al. v. Hines.

ships, and ranges, without any indication of the state or county, and without reference to any object from which a location within this State could be inferred. The lower court overruled appellants' demurrer to said complaint, and that ruling presents one of the alleged errors for review.

In our opinion, the description was fatally deficient in not pointing out the lands in question with such certainty as, when carried into the decree, the judgment of the court would become effective without extraneous evidence. Without pointing out the location by county or state, or some fixed monument of which judicial knowledge would be taken, it could not be known that the lands were within the jurisdiction of the court. As a question of pleading, the complaint, in this respect, was bad, and the demurrer should have been sustained. *Swatts v. Bowen*, 141 Ind. 322, and authorities there cited. See, also, *Weed v. Edmonds*, 4 Ind. 468; *Boxley v. Collins*, 4 Blackf. 320; *Eel River, etc., Assn. v. Topp*, 16 Ind. 242; *Leary v. Langsdale*, 35 Ind. 74; *Lenninger v. Wenrick*, 98 Ind. 596; 1 Works Prac., 134; *Liggett v. Lozier*, 133 Ind. 451.

Counsel for appellee insists that after verdict the complaint will be regarded as amended as to the description. A like insistence was made in *Lenninger v. Wenrick*, *supra*, but its application was denied. The statute, section 670, Burns' R. S. 1894, under which amendments for any defect in form are deemed to have been made does not apply to matters of substance which have been omitted. *May v. State Bank*, 9 Ind. 233; *Johnson v. Breedlove*, 72 Ind. 368; *Friddle v. Crane*, 68 Ind. 583; *Old v. Mohler*, 122 Ind. 594; *Elliott's App. Proc.*, section 640.

An error in overruling a demurrer is never cured by this statute. *Johnson v. Breedlove*, *supra*; *Abell v. Riddell*, 75 Ind. 345; *Pennsylvania Co. v. Poor*, 103 Ind. 553.

Mickels et al. v. Ellsesser et al.

The record presents a further question as to the admissibility of evidence that the alleged fraudulent grantor was a resident householder, and entitled to exempt the property in question. These questions may not arise upon another trial of the cause, and we do not pass upon them. It may not be amiss, however, to refer to the recent case of *Isgrigg v. Pauley*, 148 Ind. 436, wherein it was decided that the right of exemption and the inchoate right of the wife were proper subjects of inquiry in determining the question of fraud in the conveyance of property.

For the error named, the judgment is reversed, with instructions to sustain the demurrer of the appellants to the complaint.

MICKELS ET AL. v. ELLSESSER ET AL.

[No. 18,832. Filed February 8, 1898.]

149	415
156	570

DESCENT.—Widow Remarrying.—Rights of Under Statute of 1852.—Partition.—Quieting Title.—A married woman, holding real estate by virtue of a previous marriage, could not, during such marriage, under the statute of descents in force from 1852 to 1879, 1 Davis R. S. 1876, p. 411, alienate the same; and a judgment quieting title to real estate held by a married woman by quitclaim deed from the other heirs, in division of her deceased husband's real estate, made prior to the amendment of such statute, and adjudging her to have an absolute fee simple title, without any restraint upon her right to alienate the same, was erroneous, notwithstanding such deeds of partition were made in pursuance of an oral agreement, for the purpose of vesting in each a fee simple title absolute.

From the St. Joseph Circuit Court. *Reversed.*

A. L. Brick, for appellants.

J. P. Creed and Talbot & Talbot, for appellees.

JORDAN, J.—The appellee, Emeline Ellsesser, together with her husband, co-appellee herein, instituted this action against the appellants, Mary and Peter

Mickels et al. v. Ellsesser et al.

Mickels, her husband, to quiet title to a certain described tract of land, containing fifty acres, situated in St. Joseph county, Indiana. There was a special finding of facts, and conclusions of law thereon, by the court, in favor of the appellee, to the effect that she held an absolute fee simple title to the land in suit, without any restraint upon her right to alienate the same, and was entitled to have her title quieted as against the appellant, Mary Mickels; and judgment was rendered that her title be quieted, and she was adjudged to have an absolute title in fee simple to the land in question, freed from any restraint upon her power of alienation.

The facts found by the court, upon which the judgment is based, are the following: John Doyle, Sr., in the year 1854, died, intestate, at St. Joseph county, Indiana, the owner in fee simple of two hundred and twenty-eight acres of land situated in said county, of which the premises described in the complaint and judgment formed a part. Doyle left, surviving him, as his widow, Emeline Doyle (now Emeline Ellsesser, the appellee), and three children, Mary Doyle (now Mary Mickels, appellant), Rosa Doyle, and John Doyle, Jr., all three being the issue of the marriage with appellee. Mrs. Doyle, the widow, in 1857, was again married to Charles Ellsesser, her present husband and co-appellee, and Mary Doyle, the appellant, in 1867, was married to Peter Mickels, her present husband and co-appellant. John Doyle, Jr., died in 1868, intestate, leaving his mother, the appellee, and his two sisters, the appellant and Rosa Doyle, as his only surviving heirs. In 1869, Rosa Doyle died, intestate, leaving her sister and mother, appellant and appellee, as her only surviving heirs. No administration was had upon the estate of John Doyle, Sr., nor upon those of his two deceased children, and the said real estate re-

mained undivided until 1870. In October of that year, it was orally agreed by and between Mrs. Ellsesser and her husband (appellees), and Mrs. Mickels and her husband (appellants), that they would partition the said lands by the means of quitclaim deeds, for the purpose of vesting in each other an absolute fee simple in certain parts of the lands, which they then held undivided under the titles aforesaid stated. In pursuance of the said oral agreement, on October 13, 1870, appellants executed to the appellee Emeline Ellsesser a quitclaim deed to certain described tracts embraced in the 228 acres of land, one of said tracts containing fifty acres, being the same land involved in this action, and the other containing twenty-four acres, making a total of seventy-four acres quitclaimed by the appellants to the appellee Mrs. Ellsesser. The appellees, at the same time, by their deed, quitclaimed to the appellant Mary Mickles certain described tracts out of said 228 acres, amounting in all to 154 acres. The court finds that, at the time the said quitclaim deeds were executed, it was orally agreed and understood by the parties that the real estate described in each of said quitclaim deeds was to be held by each of said parties, respectively, by an absolute fee simple title, with full power of alienation. The quitclaim deeds are set out in the special finding, and each recites that the respective grantors quitclaim the land therein described for the sum of \$500.00, but there is no agreement nor statement contained therein in respect to the partition of the lands, nor as to the manner in which the same are to be held by the parties. The appellants, before the beginning of this action, sold and quitclaimed to George Fountain all of the lands allotted to Mrs. Mickels in the said partition, and appellees, before the commence-

Mickels et al. v. Ellsesser et al.

ment of this action, sold and conveyed the twenty-four acres quitclaimed to Mrs. Ellsesser by the appellants; and the real estate involved in this suit is all which she now has of the portion allotted to her under the partition. There is no finding that the appellants, or either of them, are making any claims to the premises herein involved, adverse to the title or claim of Mrs. Ellsesser, or that appellants claim any present right or interest in or to the same.

The sole question presented for our decision is: Do the facts warrant the judgment which the court rendered? It is not controverted by the parties but that upon the death of the ancestor, John Doyle, Sr., his lands descended, one-third to his said widow, and the remainder to their three children; that subsequently, by the death of the two children, the mother, Mrs. Ellsesser, and the sister, Mrs. Mickels, became seized equally by inheritance from these deceased children of the undivided interests which they had in the real estate, and therefore, after the death of these children, Mrs. Ellsesser was invested with an additional one-fourth, making her entire undivided moiety equal to seven-twelfths of the whole tract owned and held by John Doyle, Sr., at his death; and that Mrs. Mickels was the owner of the remainder; and that the land was held by the parties by these undivided shares as tenants in common, at the time the division was made, in October, 1870. The contention of counsel for appellants is that by reason of the fact that Mrs. Ellsesser, after the death of her first husband, intermarried with her co-appellee, holding the real estate in controversy in virtue of her previous marriage, she was interdicted by the statutes of descents then in force from making any conveyance or disposition of her interest in the land which she acquired as the widow of Doyle, and that the court, under the facts, had no power to

relieve the appellee from the restraint of alienation imposed by a positive statute. Counsel for the appellees insist that the quitclaim deeds are shown by the facts to have been executed by the parties for a two-fold purpose. First, for the purpose of dividing the land; second, for the purpose of vesting in each a fee simple title absolute; that as the deeds were made in pursuance of the oral agreement stated in the court's finding, and inasmuch as appellant and appellee, under the agreement, accepted the particular portion of the land conveyed to each, consequently, neither can be heard to call in question the title of the other.

Section eighteen of the statutes of descents, in force since 1852, and which remained unchanged until 1879, reads as follows: "Sec. 18. If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." 1 Davis R. S. 1876, p. 411. This section was materially changed and amended in 1879, and, as now in force, it constitutes section 2641, Burns' R. S. 1894 (2484, R. S. 1881). This change or amendment of the law does not affect the question involved in this appeal, and it must be controlled by the law as it existed at the time the partition of the land was made, in October, 1870. *Wright v. Wright*, 97 Ind. 444; *Haskett v. Maxey*, 134 Ind. 182. This section of the statute relating to descents and the apportionment of the estates of deceased persons has been frequently considered and construed by this court, and the holding under the original act has uniformly been that all deeds, mortgages, or agreements made during the second

Mickels et al. v. Ellsesser et al.

marriage by the former widow, in regard to the land which she held in virtue of her previous marriage, which were directly or indirectly in contravention of this statute, were therefore absolutely null and void. The law as it stood prior to 1879, was construed as having a two-fold object: First, to tie the hands of the woman during her second marriage, and thereby protect her from improvident and injudicious alienations; second, to preserve the property for her children in virtue of the marriage by which she received it. See *Vinnedge v. Shaffer*, 35 Ind. 341; *Connecticut Mutual, etc., Co. v. Athon*, 78 Ind. 10, and the many cases there cited. In the case of *Avery v. Akins*, 74 Ind. 283, after the second marriage, partition was made of the lands, which descended from a former husband, among his widow and the children of the previous marriage. During this second coverture, the woman, by her warranty deed, in which her husband joined, attempted to convey the land allotted to her in severalty, for a valuable consideration to her paid. One of the children by the previous marriage, being the only one then living, consented to the conveyance, and, on attaining full age, executed a quitclaim deed to the purchaser for the purpose of ratifying the conveyance which her mother had made, and for the purpose of passing all of her present or expectant interest in the land, and in order to free it from any claim or demand of the said child. The mother subsequently died, during her second marriage, and the daughter received from the stepfather \$1,300.00, being the balance of the purchase money which the mother had received, and left at her death unexpended, which money the daughter accepted with the full knowledge of the source from which it had been derived. It was held in that case that the daughter was not estopped to claim title to the land by descent from the mother, and could

successfully maintain an action for the recovery thereof. There is no question but what the one-third interest in the land which the appellee inherited from her husband was a fee simple, which at any time, if not under a subsequent coverture, she could have fully and freely conveyed or disposed of as she saw proper, notwithstanding the fact that there were children of the previous marriage. But during any subsequent marriage, prior to the modification of the law in 1879, her right to alienate such interest in the land, or to dispose of it in any manner, directly or indirectly, was absolutely suspended or prohibited by the positive command of the statute; and, in the event she died during such coverture, the land would go to the child or children of the former marriage, in virtue of which she obtained it, without regard to any attempt of alienation or disposition upon her part. *Avery v. Akins*, *supra*; *Ir v. Mater*, 134 Ind. 238; *Horlacker v. Bradford*, 141 Ind. 528.

It is true that the rigor of the rule originally prescribed by the statute, and on which the earlier decisions of this court are founded, has been changed and modified, as we heretofore said, in two material respects, by the amendment of 1879: First. The former widow, during the subsequent marriage, together with her husband, may alienate the land, provided the child or children of the previous marriage, are of full age, and join in the conveyance. Second. She and the husband may also dispose of it where there are no children or their descendants of the previous marriage in virtue of which she acquired such real estate. While, under the statute as it stood prior to the time it was modified, the appellee was absolutely forbidden during her subsequent marriage to make any direct or indirect alienation of the land which came to her by the previous marriage, nevertheless during such

Mickels et al. v. Ellsesser et al.

coverture partition of the real estate could, under the law, have been enforced between her and the appellant with whom she held the realty as a co-tenant. *Finch v. Jackson*, 30 Ind. 387; *Bumgardner v. Edwards*, 85 Ind. 117, and cases there cited. It is a general rule of the law that parties may voluntarily and legitimately do without a suit whatever the law will compel them to do in an action through the judgment of the court. Consequently, the right of the appellant and appellee to sever the unity of possession by making a division or allotment of their respective moieties by the means of quitclaim deeds cannot be controverted. A voluntary partition of land made by persons under legal disabilities will be upheld as binding when the same has been fairly and equally made, and is free from all taint of fraud in its inception and consummation. Freeman on Cotenancy and Partition, sections 412 and 415. The partition made by these parties in 1870, so far as it was a reasonably fair and equal allotment, in value, of the undivided interest which each held in the land, was in harmony with the law; and the quitclaiming by the parties to each other for that purpose cannot be said to have been an alienation of the land in violation of the statute. The result of the partition made under the quitclaim deeds in question did not vest in either of the parties any new or additional title, but, after the consummation of the division, each held the portion of the realty allotted to her by precisely the same title, and subject to all the burdens and restrictions by which she formerly held her undivided interest or share. The rule generally affirmed is that partition of real estate, whether made under the judgment of a court or by the means of partition deeds, gives to the tenant no new or different title. *Avery v. Akins*, *supra*; *Bumgardner v. Edwards*, *supra*; *Thorp v. Hanes*, 107 Ind. 324. The

right of the appellee, however, to make partition and thereby have her interest in the land apportioned to her in severalty, did not carry with it the power or right, under the circumstances, to enter into any oral or written agreement with the appellant for the purpose of relieving or exempting her from the restraint which the law, as it then stood, imposed upon her right of alienation; and no consideration which the appellant may have received, or any agreement into which she may have entered, can serve to operate in contravention of the statute. Consequently, the fact that there was an agreement, either oral or written, between the appellant and appellee, under the circumstances, to the effect that the land quitclaimed by one to the other was to be held by each in fee simple absolute, with full power of alienation, can exert no influence whatever upon the decision of the question here in issue. That this proposition is true, we think, there can be no contrariety of opinion. The right which Mrs. Mickels possessed to convey or dispose of her interest in the land, was not subject to any restriction under the law, and she could alienate it at will, provided her husband joined her in the conveyance. The appellee had equally the same right and power in regard to the interest in the land which she inherited from her deceased children.

It is insisted upon the part of counsel for the appellant, however, that the decision of this court in the appeal of *Fugate v. Payne*, 130 Ind. 281, is controlling upon the question here involved. The conveyances in that case were made after the law was modified by the amendment of 1879; and while that cause, under the facts and the law as it then existed, was correctly decided, still that decision can have no bearing upon the case at bar. While appellants, under the statute as now modified, might voluntarily join appellees in a

Dunn et al. v. Dunn et al.

conveyance of the land, and thereby effect an alienation, and bar the expectancy of Mrs. Mickels in the property, nevertheless there is no law that will compel them to do so; neither does the law, under the facts, authorize the court, by its decree, to relieve the appellee from the inhibition of the statute, and thereby involuntarily bar and deprive the appellant of her expectant interest in the land in the event of her mother's death during a subsequent coverture. There is nothing disclosing that any of the interest which the appellee acquired from her two children is embraced in the land in controversy; hence we do not consider the case upon any theory in respect to this feature.

Possibly there are equities in the case in favor of the appellee which the record does not disclose; but these in such a cause as this, the court is not permitted to consider, and the law must be accepted and applied as enacted with all its rigor. It follows that the judgment cannot be sustained, and it is therefore reversed, and the cause remanded to the lower court, with instructions to vacate its judgment, and grant appellants a new trial.

HOWARD, C. J., did not participate in the decision of this case.

DUNN ET AL. v. DUNN ET AL.

[No. 18,281. Filed February 4, 1898.]

149	424
152	556
149	424
154	107
155	17
156	500

APPEAL AND ERROR.—*Record.*—No question is presented on appeal on an assignment of error to the ruling of the court on a demurrer to the amended complaint, where neither the amended complaint nor the demurrer is set forth in the record. *p. 425.*

SAME.—*Assignments of Error.*—*Failure to Argue.*—*Waiver.*—Assignments of error are waived by failure to argue same. *p. 425.*

EVIDENCE.—*Objection to Admission.*—*When Evidence not in Record.*—*Bill of Exceptions.*—A specification of error based upon the admission of evidence contrary to the provisions of section 507, Burns'

Dunn et al. v. Dunn et al.

R. S. 1894 (499, R. S. 1881), in the trial of an action by heirs affecting title to the ancestor's property, presents no question, where neither the complaint nor the evidence is in the record, and no statement is made in the bill of exceptions as a ground for objection that the action was of the character contemplated by said statute. pp. 425, 426.

From the Newton Circuit Court. *Affirmed.*

Daniel Fraser and Will Isham, for appellants.

Cummings & Darroch, for appellees.

MONKS, J.—Appellees brought this action, and obtained judgment against appellants. The errors assigned by appellants, and not waived, are: First, that the court erred in overruling appellants' demurrer to each paragraph of the amended complaint; second, that the court erred in overruling appellant's motion for a new trial.

The first assignment of error presents no question, for the reason that no amended complaint is set forth in the record. The presumption is that the ruling of the trial court was correct, and, unless both the amended complaint and the demurrer thereto are set forth in the record, the court cannot say that reversible error was committed. *Aydelott v. Collings*, 144 Ind. 602; Elliott's App. Proc., section 720.

All the specifications for a new trial are waived by appellant's failure to argue the same, except one. That specification is that the court erred in permitting two incompetent witnesses, appellees George Dunn and Alice Baldwin, to testify on behalf of appellees. The bill of exceptions shows that the objection stated to the trial court was: "First, That said witnesses were incompetent because the action was to reach and affect the title to real estate of which the said Sarah Dunn died seized, leaving the plaintiff George Dunn, said witness, and her husband, surviving, and said plaintiff, the said witness Olive Baldwin, with the

Dunn et al. v. Dunn et al.

defendant James T. Dunn, and others, her children, and that each of said witnesses, was incompetent to testify against the defendant James Dunn as to matters and things occurring during the lifetime of said Sarah Dunn, because it was an action between heirs to reach and affect the property of the decedent from whom the parties claimed; which objection the court overruled, to which appellants excepted, and said witnesses were permitted to testify." Section 507, Burns' R. S. 1894 (499, R. S. 1881), provides that "in all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title or possession of property, real or personal, of, or in the right of, such ancestor, or to affect the same in any way, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor."

The evidence given at the trial of said cause is not in the record, and no facts are stated in the bill of exceptions showing that this action was "founded on a contract with, or a demand against, the ancestor to obtain title to or possession of property, real or personal, of or in the right of such ancestor, or to affect the same in any manner." Nor in the objection to the competency of said witnesses, set forth in the bill of exceptions, is it stated as a ground for said objection that the action was of the character mentioned in said section 507 (499), *supra*. The amended complaint is not in the record, and as all presumptions are in favor of the ruling of the trial court, and it not being otherwise shown that this action was of the character which rendered said witnesses incompetent, and that this was stated as one of the grounds of objections to the competency of said witnesses, error is not affirmatively disclosed by the record.

Finding no available error in the record, the judgment is affirmed.

Richards v. Reeves et al.

[149 427]
[168 811]

RICHARDS v. REEVES ET AL.

[No. 18,305. Filed February 4, 1898.]

COMPLAINT.—*Action to Enforce Lien on Real Estate by Infant Legatees.*—*Demand.*—Where by the terms of a deed the grantee thereof was to pay to each of grantor's infant grandchildren a certain sum of money upon their arrival at the age of twenty-one years, respectively, a complaint by such grandchildren in an action against grantee, after their arrival at full age, to enforce a lien against the real estate so conveyed, need not allege a demand. *pp. 427, 428.*

DEEDS.—*Gifts.*—*When May be Revoked.*—Where a person old and infirm made a conveyance of her real estate to her son, conditioned that he should pay a certain sum of money to her grandchildren upon their arrival at the age of twenty-one years, reserving a life estate therein for herself and husband, and intending to reserve the right to revoke the deed in case it should turn out that the income from the property should not be sufficient for her support and that of her husband, besides paying the necessary expenses of caring for the property, but through her own ignorance and mistake and that of the scrivener, such reservation was not put in the deed, a reconveyance thereof by the son at the request of the grantor, in consideration that if the son would pay the taxes and other expenses against the land she would reconvey same to him free from the conditions in favor of the grandchildren, defeated and revoked the gifts made to the grandchildren by the first deed. *pp. 428-434.*

From the Sullivan Circuit Court. *Reversed.*

John S. Bays, for appellant.

Briggs & Lindley, for appellees.

HOWARD, C. J.—This was an action by appellees against appellant and his grantee, one James M. Hummel, to enforce in favor of appellees a lien alleged to exist upon a certain forty acres of land, by virtue of a conveyance thereof made to appellant. From the complaint it appears that the appellant is the son, and the appellees are the grandchildren, of one Sarah I. Thompson, who departed this life intestate May 9, 1888, her husband having died before her. On September 9, 1879, the said Sarah I. Thompson was the owner

Richards v. Reeves et al.

in fee of the land upon which the lien is claimed; and on that day, by warranty deed, she and her husband conveyed said land to her son, the appellant, reserving a life estate therein for herself and her husband. One consideration of the conveyance so made was that appellant, his heirs or assigns, should pay, or cause to be paid, to each of the appellees, the sum of \$100.00 on the arrival of each, respectively, at the age of twenty-one years. It is alleged that the appellant accepted said deed, and placed the same on record, that the appellees, who were minors at the execution of the deed, are all now of full age; and that no part of said sum of \$100.00 due to each has been paid.

It is contended by appellant that the complaint is insufficient, for the reason that no demand is shown. In the very similar case of *Pruitt v. Pruitt*, 91 Ind. 595, it was held that, the time for payment being fixed in the contract, no demand was necessary. The deed in this case provided that the money should be paid to appellees by their uncle on their coming of age, respectively, and this time was ascertainable on inquiry. The court did not, therefore, err in overruling the demurrer to the complaint.

The appellant filed an answer in which it was averred that at the time of making the deeds the said Sarah I. Thompson and her husband were old and infirm; that the land so disposed of was all the property that either she or her husband then or at any time thereafter owned; that she and her husband, being unable to work and earn their living thereby, believed that said forty acres of land would afford them necessary maintenance during their natural lives, and desired, in case the rents and profits of the land were sufficient so to support them, that, on their death, the property should go to her son, subject to the payments to her grandchildren provided for in the deed; that she and

her husband also believed that, besides their support, the rents and profits of the land would be sufficient to pay all assessments and taxes on the property and keep up all necessary repairs thereon. But, it is averred, the said Sarah I. Thompson had no purpose or intention, in executing said deed, to make the same irrevocable; that, on the contrary, she reserved to herself the right to revoke the same should she find the interest thus reserved insufficient for her support and that of her husband, but, by ignorance and mistake on her part and on the part of the scrivener, she did not express in the deed such right of revocation; that after the execution of the deed she attempted to support herself and her husband, and pay said taxes and other expenses, by the use, control, rents and profits of said property; but that after about one year she became sick, and incurred obligations for medical treatment, and then discovered that it would be impossible to obtain support for herself and her husband from said premises, and also to pay said medical charges, taxes, and other expenses, besides keeping said property in repair; that thereupon the said Sarah I. Thompson and her husband, for the purpose of carrying out their intention that said land should furnish them a support during their natural lives, demanded of appellant a reconveyance of the land, agreeing that, as a part of the consideration for such reconveyance, appellant should not be required to pay to appellees said sums made a charge upon said land. It is finally averred, that, in order to enable the said Sarah I. Thompson to revoke the deed mentioned in the complaint, with the view to carry out her purpose to obtain her livelihood from said land, and in pursuance of her promise to reconvey said land to appellant, and to revoke and annul the conditions as to appellees, and in further consideration that appellant would pay all

taxes and assessments against said premises, and keep up the necessary repairs thereon during the natural lives of the said Sarah I. Thompson and her husband, said appellant and wife did reconvey said land by warranty deed to the said Sarah I. Thompson. To this answer a demurrer was sustained, and, the appellant refusing to plead further, judgment was rendered in favor of appellees. The amounts found due the appellees were declared liens on said land, and the liens ordered foreclosed, and, on failure to recover from appellant the sums so found due on such liens, the land was directed to be sold to satisfy the same.

There is no doubt that, in the making of the deed referred to in the complaint, Mrs. Thompson designed to give the property which she should have left at her death and the death of her husband to her son and her minor grandchildren, and it is equally clear that the deed was accepted by her son with the agreement that he would pay to the grandchildren the consideration in their favor named in the deed. As a general rule, such a deed is irrevocable, without the consent of the beneficiaries. By the reconveyance, appellant could, of course, as he did, consent to the revocation of the deed, but such action on his part could not bind appellees. As said in *Pruitt v. Pruitt, supra*, the delivery of the deed to appellant, containing the provision for paying the money to the appellees, became, as to Mrs. Thompson, an executed gift of appellant's promise to pay the money. The placing of the deed upon record operated in favor of appellees as well as of appellant. From the beneficial character of the provision for appellees, an acceptance may be presumed. In the case of minors, no formal acceptance of a gift is required in order to make it binding. The law implies an acceptance, even though the infant is ignorant of the gift. It becomes binding and irrevocable.

cable as soon as it passes from the control and dominion of the donor. See, further, *Waterman v. Morgan*, 114 Ind. 237; *Copeland v. Summers*, 138 Ind. 219, and authorities cited in those three cases. In 1 Perry Trusts, section 104, as cited in *Ewing v. Jones*, 130 Ind. 247, is found a like statement: "A trust once created and accepted without reservation of power can only be revoked by the full consent of all parties in interest; if any of the parties are not in being, or are not *sui juris*, it cannot be revoked at all."

But it is averred in the answer that the donor here did intend to reserve in her deed a right to revoke the same, in case it should turn out that the income from the property should not be sufficient for her support and that of her husband, besides paying the necessary expenses of caring for the property; and that, through her own ignorance and mistake and that of the scrivener, such reservation was not put in the deed. We are inclined to think that Mrs. Thompson herself might have secured a revocation or a reformation of her deed by giving evidence in support of allegations such as those made in this answer. If she could, it is not apparent why she might not attain the same end by revoking her deed in the manner disclosed in the answer.

As said in *Ewing v. Wilson*, 132 Ind. 223, "it is too well settled to admit of controversy that parol evidence is competent for the purpose of proving fraud or mistake," and also: "It is an elementary rule that parol evidence is competent to prove the consideration of a deed, and a rule of like elementary character is, that parol evidence is admissible even where there is no fraud or mistake to show facts surrounding the execution of an instrument." See also *Ewing v. Bass*, ante, 1.

As further said in the two cases last cited, it ap-

Richards v. Reeves et al.

pears here that the immediate parties to the deed did not intend that the instrument should be irrevocable. The mere fact that a reconveyance was made, is at least indicative of their belief that the gift was not irrevocable. Had Mrs. Thompson and her husband found that they should be able to obtain their support and necessary expenses from the rents and profits of the land, undoubtedly the deed would have remained as drawn; but this, of itself, does not show to a certainty that she did not intend to retain the power to revoke the gift thus made, in case it should turn out that she had thus deprived herself and her husband of the means of living during their declining days.

It is to be remembered that this was not, strictly speaking, a contract between Mrs. Thompson and appellees, but a gift by her to them. They had given nothing for what was promised them in the deed; and while, in general, a gift, under such circumstances, will be upheld in favor of a donee who is unwilling that it should be revoked, and particularly in favor of a minor for whom the law makes an acceptance, and who is himself unable to relinquish such gift, yet the reasons for upholding a contract do not obtain in all their force in favor of sustaining a simple gift, whether *inter vivos* or *causa mortis*. Equity will set aside such a voluntary gift when it is made to appear that the donor did not intend to make it irrevocable, or where the settlement would be unreasonable or improvident for lack of a provision for revocation. Mrs. Thompson had the first right to the use of her property; and if, through kindness to her son and grandchildren, she forgot what might be needed for her own and her husband's feeble old age, and so, improvidently, deeded to them what she herself required to live upon, and which she never intended to give up, so far as might be necessary for her sustenance, then the deed resulting from

such a mistake will be set aside, as in other cases of mistake or in case of fraud. Even in case of pure contract, and where there is no question of gift, the law will give relief where proof of mistake or fraud is clear and convincing. Equity will not lend its sanction to what is unconscionable.

In *Garnsey v. Mundy*, 24 N. J. Eq. 243, a voluntary deed of trust, reserving no power of revocation, made with a nominal consideration, and without legal advice as to its effect, and when there was evidence that its effect was misunderstood by the grantor, was set aside, and a reconveyance ordered; and it was there further held that the fact that the grantor's infant children were beneficiaries under the deed would not prevent the relief. See note to this case, 13 Am. Law Reg. 345. See, also, *Everitt v. Everitt*, L. R. 10 Eq. 405, and *Woolaston v. Tribe*, L. R. 9 Eq. 44. In *Coutts v. Acworth*, L. R. 8 Eq. 558, it was said: "The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. And, where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of the solicitor to insist upon the insertion of such power, and the want of it will in general be fatal to the deed." Whether this English statement of the rule is too strong we need not say. It is enough, in this case, that the facts admitted to be true by the demurrer to the answer show that Mrs. Thompson's deed was improvident, that she needed the property for herself and her aged husband, that she intended to retain the right to revoke the gift, and that it was only by her own ignorance and mistake, and that of the scrivener, that a clause to show

Chapman *et al.* v. Jones *et al.*

the retaining of such right of revocation was not inserted in the deed. If the facts were different, the appellees should show them by reply and by proof.

Judgment reversed, with instructions to overrule the demurrer to the answer.

CHAPMAN ET AL. v. JONES ET AL.

149 434
150 347

[No. 18,175. Filed Oct. 28, 1897. Rehearing denied Feb. 4, 1898.]

PRACTICE.—*Withdrawal of Paragraph of Complaint by Court.*—The withdrawal of a paragraph of complaint by the court is equivalent to a dismissal thereof, and no one but the plaintiff can complain of such action. *p. 435.*

SAME.—*Harmless Error.*—Where the court withdrew a paragraph of complaint, a former ruling on a demurrer thereto although erroneous was rendered immaterial and harmless. *p. 435.*

QUIETING TITLE.—*Complaint Must Show Title in Plaintiff.*—A complaint to quiet title to real estate is bad on demurrer for want of sufficient facts to constitute a cause of action, if the facts stated therein fail to show title in the plaintiff. *p. 436.*

SAME.—*Parties.*—*Statutes Construed.*—Section 1096, Burns' R. S. 1894 (1078, R. S. 1881), authorizing any person having a right to recover the possession of real estate, or to quiet title thereto, which is in the name of another person, to prosecute either action in his own name must be construed with section 251, Burns' R. S. 1894 (251, R. S. 1881), which requires all actions to be prosecuted in the name of the real party in interest. *pp. 437, 438.*

APPEAL.—*Reversal.*—*Technical Defects.*—Overruling a demurrer to a bad complaint affects the substantial rights of the defendant to such action and in such case the trial cannot have a just determination, except the determination be for the defendant, and the Supreme Court will not refuse to reverse such ruling on account of the provision of section 401, Burns' R. S. 1894 (398, R. S. 1881), to the effect that the Supreme Court shall not reverse any judgment for any error which does not affect the substantial rights of the adverse party. *p. 439.*

SAME.—*Rehearing.*—*Questions Presented for First Time.*—The Supreme Court is not bound to consider questions presented for the first time in a petition or brief for a rehearing. *p. 440.*

PLEADING.—*Supplemental Complaint.*—A supplemental complaint is not an amendment to the complaint, and its office is not to supply omissions or defects in the original complaint, but to bring up mat-

ters proper for litigation in such action that have occurred since the commencement of the action. p. 440.

PLEADING.—*Amended Complaint.*—*Supplemental Complaint.*—Facts existing at the time of filing the original complaint must be brought into the case by an amended complaint and not by a supplemental complaint. p. 442.

From the Tipton Circuit Court. *Reversed.*

Perry Behymer and *W. R. Oglebay*, for appellants.
G. H. Gifford and *J. R. Coleman*, for appellees.

MCCABE, C. J.—The appellee Jones sued the appellants in a complaint in two paragraphs, the first to set aside a sheriff's sale of certain described real estate in said Tipton county, and the second to quiet the title to the same real estate. The first trial of the issues formed resulted in a general finding for the plaintiff on the second paragraph of the complaint; the first paragraph having been withdrawn by the court after the evidence was heard, and before the finding was announced. A new trial having been granted as of right, under the statute, appellee Ezra N. Todd, on his application, was made a party plaintiff along with appellee Jones. The issues were again tried by the court, resulting in a general finding for the plaintiffs, upon which the court accordingly rendered judgment.

Error is assigned upon the action of the trial court in overruling a demurrer to each of the first and second paragraphs of the complaint, in withdrawing the first paragraph, and in overruling appellant's motion for a new trial. The action of the court in withdrawing the first paragraph could not harm the defendants, the appellants here. Such action was tantamount to the dismissal of the paragraph, and no one but the plaintiffs could complain of that. The withdrawal of the paragraph rendered the ruling on the demurrer thereto immaterial and harmless, even if erroneous. *Stout v. Duncan*, 87 Ind. 383.

Chapman *et al.* v. Jones *et al.*

The ruling upon the demurrer to the second paragraph was clearly wrong. As before observed, it was a complaint to quiet title to real estate. The plaintiffs in that paragraph are Levi Jones and Ezra N. Todd. It states, in substance, that Aaron Swoveland and Robert Kinney are the owners in fee simple of the land in controversy, describing it, being a lot in the city of Windfall, Indiana; that the plaintiff conveyed said land to Ezra N. Todd by a warranty deed; that said Todd has conveyed said land, by warranty deed, one-half to Aaron Swoveland, and the other half to Robert C. Kinney; that the defendants are claiming some right or interest in, to, or against said land, which they claim to be paramount to the title conveyed by this plaintiff. It thus appears that neither of the plaintiffs have any interest or title in the land whatever. It is thoroughly settled in this State that a complaint to quiet title will be bad on demurrer for want of sufficient facts to constitute a cause of action, if the facts stated therein fail to show title in the plaintiff. *Keepfer v. Force* 86 Ind. 81; *Darkies v. Bellows*, 94 Ind. 64; *Indiana, etc., R. W. Co. v. Brittingham*, 98 Ind. 294; *McPheeters v. Wright*, 110 Ind. 519; *Locke v. Catlett*, 96 Ind. 291; *Ragsdale v. Mitchell*, 97 Ind. 458; *Spencer v. McGonagle*, 107 Ind. 410.

It is conceded by the appellees that ordinarily a complaint to quiet title must state that the plaintiff is the owner, or state facts sufficient to show title in the plaintiff. But in this case it is contended by appellees' learned counsel that the interest of the plaintiffs, as grantors by warranty deed, first from Jones to Todd, and then from Todd to Swoveland and Kinney, affords grounds sufficient to give them a standing in court as plaintiffs; that is, the fact that they have both executed warranty deeds attempting to vest the title

to the real estate in Swoveland and Kinney gives the plaintiffs a direct interest in making good their respective warranties by quieting the title of their grantees. That, however, would be in direct conflict with the above mentioned established rule, that a complaint to quiet title, in order to be good, must show title in the plaintiff.

But appellees' learned counsel contend that where an action of ejectment is brought, the defendant may notify his grantor, where the grant is by warranty deed, to come in and defend the title which he has warranted, and that upon such notice, or upon his own application, he may be admitted to defend. And that on the service of such a notice, whether the grantor defends or not, the judgment, if it be in favor of the plaintiff, will be conclusive upon such grantor that such successful plaintiff's title was paramount to such grantor's title. Conceding, without deciding, that such is the law, yet it would not follow that such grantor by warranty deed could prosecute a suit against one who might seize the possession of the land granted by him to another by warranty deed, for the purpose of protecting his warranty, or for any other purpose. To permit such a suit to be maintained would violate a fundamental principle of our code, requiring every action to be prosecuted in the name of the real party in interest. Section 251, Burns' R. S. 1894 (251, R. S. 1881). So strong is this rule that notwithstanding section 1086, Burns' R. S. 1894 (1073, R. S. 1881), authorizing any person having a right to recover the possession of real estate, or to quiet title thereto, in the name of another person or persons, to prosecute either action in his own name, it has been held that it must be construed along with section 251, *supra*, so that, under the two sections, no such action can be brought in any other than the name of the real party in interest. *Peck*

Chapman et al. v. Jones et al.

v. *Sims*, 120 Ind. 345. Prior to the enactment of section 1086 (1073), *supra*, if lands were conveyed while in the adverse possession of a third person, a suit for possession could be prosecuted in the name of the grantor for the use of the grantee. *Steeple v. Downing*, 60 Ind. 478; *Burk v. Andis*, 98 Ind. 59. But that can no longer be done, under the two sections of the code. The action now must be brought in the name of the real party in interest, under the operation of the two sections, with unimportant exceptions mentioned in section 251, *supra*.

The conclusion seems irresistible that the second paragraph of the complaint does not state facts sufficient to constitute a cause of action to quiet title, for the reason that it shows that the plaintiffs have no title to the land. We have no means of knowing that the owners desire to have their title quieted, even if the plaintiffs could lawfully prosecute the action. It would certainly be a strange proposition that important rights of theirs could be involved in litigation without their knowledge or consent, and stranger still that they should be bound by such a judgment, a judgment to which they are not parties, but strangers. If such a judgment would be binding on them, then it would have been equally so if it had adjudged that they had no title. If such a result under the law is possible, then the old legal maxim that every person must have his day in court before he can be bound by the judgment, is overturned and done away with. And, if the judgment is not to be binding on them, then it is not binding on anybody, because the title to the real estate is the thing that constituted the subject of the litigation, the thing sought to be affected. If the judgment cannot be binding on them, then the title to the real estate is not affected by the judgment. Clearly, the complaint, to be good to quiet title, must show title in the plaintiffs.

Counsel for appellees, conceding the complaint to be technically bad, say that a fair and complete trial of the merits of the cause has been had, and a just determination of the rights of the parties resulted, and that the cause ought not to be reversed for such defect.

The difficulty with this proposition is that a cause can have no merits where there is no complaint, or where the complaint, as here, does not state facts sufficient to constitute a cause of action, which, on demurrer, is the same thing as no complaint; and in such a case the trial cannot have a just determination, except that determination be for the defendant. The statute provides that this court shall not reverse any judgment for any error which does not affect the substantial rights of the adverse party. Section 401, Burns' R. S. 1894 (398, R. S. 1881). But overruling a demurrer to a bad complaint does affect the substantial rights of the adverse party. It compels him to defend where there is no cause of action stated against him in the complaint, and subjects him to a judgment without a cause of action. Another section provides that no judgment shall be reversed, among other things, where it shall appear to this court that the merits of a cause have been fairly tried and determined in the court below. Section 670, Burns' R. S. 1894 (658, R. S. 1881). But it does not so appear in this court. On the contrary, it appears that the only cause stated in the complaint has no merits whatever, for want of facts sufficient to constitute a cause of action. The court erred in overruling the defendants' demurrer to the second paragraph of the complaint.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the second paragraph of complaint.

Chapman et al. v. Jones et al.

ON PETITION FOR REHEARING.

MCCABE, J.—Counsel for appellees ask for a rehearing on one ground only, and that is that, after the demurrer to the complaint was overruled, the complaint was amended, and the appellee Todd was made a co-party plaintiff with Jones, and thereafter there was no demurrer filed to the complaint. It would be an all sufficient reason to refuse to consider the question thus raised that it was not raised by appellees in their argument prior to the filing of their petition for a rehearing. The rule is well established that this court is not bound to consider questions presented for the first time in a petition or brief for a rehearing.

But counsel are in error in saying that the complaint was amended after the demurrer to it was overruled. The paper filed was a "supplemental complaint," so called at the time and so called by counsel on this petition. After appellee Todd had been made a party plaintiff, the pleading called a "supplemental complaint" was filed, showing that since the commencement of the action he had purchased the real estate in controversy, and had sold part of it to another, one Kinney, not a party to the suit.

A supplemental complaint is not an amendment to the complaint, but its office is to bring forward a matter proper to be litigated, along with the matters contained in the original complaint that has occurred since the commencement of the action, and it assumes that the original complaint is to stand as it originally stood. *Kimble v. Seal*, 92 Ind. 276; *Davis v. Krug*, 95 Ind. 1; *Pouder v. Tate*, 132 Ind. 327; *Simmons v. Lindley*, 108 Ind. 297; *Farris v. Jones*, 112 Ind. 498. The office of a supplemental complaint is not to supply omissions or defects in the original complaint, but to bring upon the record matter arising after the commencement of the suit. *Dillman v. Dillman*, 90 Ind. 585.

The precise question here presented by appellees' petition for a rehearing was decided adversely to them in *Simmons v. Lindley*, *supra*, in the following language, beginning on page 299: "The original complaint sought to recover the possession of real estate, and it contained no averment of the fact, if it were a fact, that Martha A. Woods, the plaintiff therein, was entitled to possession of the real estate, at the time she commenced her suit. For the want of such an averment, it is clear that the original complaint herein did not state facts sufficient to constitute a cause of action, and that the demurrer thereto ought to have been sustained. [Citing authority.]

"But can this error of the court, for such it was, be made available by the appellant for the reversal of the judgment below? As we have seen, after the death of the original plaintiff, Martha A. Woods, the appellees, as her heirs and devisees, appeared and filed what they called 'a supplemental complaint herein.' We have said that the appellant had failed to challenge the sufficiency of this so-called supplemental complaint, by a demurrer thereto for the want of facts; but the reason for this failure may have been that, in *Derry v. Derry*, 98 Ind. 319, it was held by this court that a demurrer to a supplemental complaint is unwarranted, and presents no question. In section 399, R. S. 1881, which is a literal reenactment of section 102 of the civil code of 1852, provision is made for filing 'supplemental pleadings, showing facts which occurred after the former pleadings were filed.'

"In *Musselman v. Manly*, 42 Ind. 462, after quoting such section 102 of the civil code of 1852, then in force, the court said: 'A supplemental complaint is not, like an amended complaint, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint and assumes that the original complaint is to stand.'

Chapman et al. v. Jones et al.

"A supplemental complaint must show facts which occurred after the filing of the original complaint. If the original complaint is bad, and at the time it was filed, there were facts then existing which, if they had been properly pleaded, would have made such complaint sufficient to stand without a demurrer for the want of facts, it is settled by our decisions that such existing facts can only be brought into the case by an amended complaint, and never by a supplemental complaint. *Patten v. Stewart*, 24 Ind. 332; *Musselman v. Manly*, *supra*; *Morey v. Ball*, 90 Ind. 450; *Dillman v. Dillman*, 90 Ind. 585; *Davis v. Krug*, 95 Ind. 1; *Derry v. Derry*, *supra*.

"In the case under consideration, the appellees did not attempt to supply the material omitted averment in the original complaint, by their supplemental complaint. It is true they alleged, that they were entitled to possession of the real estate in controversy; but it does not follow from this averment, by any means, that the original plaintiff, Martha A. Woods, was shown to have been, or was in fact, entitled to the possession of such real estate, at the time she commenced this suit. We are constrained, therefore, to hold that the error of the trial court, in overruling the appellant's demurrer to the original complaint, is fatal to the appellee's case as they have presented it, and, for that reason, is available to the appellant for the reversal of the judgment below."

This holding then is, that if there were facts existing, at the time the original complaint was filed, which if properly pleaded would have made such original complaint sufficient to withstand a demurrer for want of facts, that such existing facts can only be brought into the case by an amended complaint, and never by a supplemental complaint.

But it was held that, even if such facts might be

The First National Bank of Frankfort, Indiana, v. Smith *et al.*

brought in by a supplemental complaint, the facts in the supplemental complaint did not supply the omission. The same is true here. The supplemental complaint here fails to show that the original plaintiff Jones, who still remains a plaintiff in the case, had any title or interest in the land in which it was sought by him to quiet title.

Petition overruled.

THE FIRST NATIONAL BANK OF FRANKFORT, INDIANA,
v. SMITH ET AL.

149 443
151 451

[No. 18,252. Filed February 15, 1898.]

FRAUDULENT CONVEYANCE.—*Inadequate Consideration.*—*Innocent Purchaser.*—*Husband and Wife.*—*Equity of Wife.*—A conveyance of real estate worth \$8,000.00 for a consideration of \$650.00, made by a husband to his wife to defraud his creditors will be set aside as fraudulent, upon such conditions as will protect the wife's interests therein, in an action by *bona fide* creditors of the husband, although the wife had no actual knowledge of her husband's fraud.

From the Clinton Circuit Court. *Reversed.*

John C. Farber, for appellant.

J. C. Rogers and *W. R. Moore*, for appellees.

HOWARD, C. J.—This was an action by appellant upon two promissory notes; also to set aside certain deeds made in fraud of the rights of appellant and other creditors, and to subject the lands conveyed to the payment of the debt due appellant. The complaint is in two paragraphs, the first counting on a note for \$742.00, given January 28, 1896, by the appellees John A. Smith and John Enright, and the second on a note for \$1,000.00, given February 15, 1896, by the same appellees. It is alleged that at the dates of execution of the notes, and for many years prior thereto, the appellee John Enright was the owner in fee simple

The First National Bank of Frankfort, Indiana, v. Smith *et al.*

of the lands in controversy, described in the complaint. It is then further alleged: "That on the 25th day of March, 1896, without any consideration, and for the purpose of and with the intent to cheat, hinder, and delay his creditors, including the plaintiff herein, and to avoid the payment of said note [notes], the said defendant John Enright conveyed said real estate to his wife, Ann Enright, by deed, for a colorable consideration of \$6,830.00, but for no actual consideration whatever; and plaintiff avers that at the time of such conveyance, prior thereto, and at all times since said conveyance, and now, the said defendant John A. Smith was and is wholly insolvent, and that no part of said indebtedness could be made by execution against him; which facts were fully known to said John Enright, Ann Enright, and Levi H. Enright at the date of such conveyance, and at the time of the conveyance to Levi H. Enright hereinafter mentioned. That the defendant John Enright did not retain sufficient property with which to pay the said claim of plaintiff, and that he had not at the time of such conveyance, nor has he since had, nor has he now, sufficient other property subject to execution to pay his debts. Plaintiff further says that afterwards, to wit, on the 2d day of June, 1896, the said defendant Ann Enright, her codefendant and husband, John Enright, joining with her, executed and delivered to the defendant Levi H. Enright a deed of conveyance for the real estate described herein as being owned by the defendant John Enright; that Levi H. Enright is a son of John and Ann Enright, and was fully acquainted with all the facts and circumstances herein set forth, and had notice of the fraudulent transfer of said real estate from John Enright to Ann Enright, and of the fact of plaintiff's claim against said John Enright, and that the same was unpaid; that such conveyance was

The First National Bank of Frankfort, Indiana, v. Smith *et al.*

so made to Levi H. Enright for a colorable consideration of \$5,400, but was, in fact, for no actual consideration, but was so executed and delivered in furtherance of the fraudulent intent on the part of John Enright, Ann Enright, and Levi H. Enright of cheating, hindering, and delaying the creditors of said John Enright, and of preventing the collection of plaintiff's claim."

The court, having heard the evidence, found for the appellant against the appellees John A. Smith and John Enright on the notes in suit, and for the appellees Ann Enright and Levi H. Enright for their costs; and over a motion for a new trial judgment was entered in accordance with such finding.

It is assigned as error that the court overruled the motion for a new trial. The chief reason urged in favor of a reversal is that the decision is contrary to law and to the evidence. That the evidence shows that John Enright made the deeds in question with the intent to prevent appellant from collecting its debt does not seem to be seriously controverted. The deeds were plainly fraudulent as to him.

In 2 Thompson Trials, section 2016, it is said that one badge of fraud consists in "the transfer by a debtor in failing circumstances of all or most of his property to his near relations." And in 2 Rice Ev. 955, the author says that slight evidence will be sufficient proof of fraudulent intent between parties who occupy confidential relations. In *Hoffman v. Henderson*, 145 Ind. 613, it was held, citing Bump. Fraud Conv. (2d ed.) 565, that evidence of other fraudulent transactions at or about the time of the transfer in controversy is also competent to prove the fraudulent intent of the debtor; and that there is, moreover, a probable connection in a series of sales nearly at the same time, the result of which is to strip a man of his available property.

The First National Bank of Frankfort, Indiana, v. Smith et al.

In the case before us it is not questioned that John Enright, besides the two deeds in controversy, executed about the same time deeds to his other children, without consideration, for other lands, and that by all his conveyances made at and near the time he was left without any property from the sale of which his debt to appellant could be paid. Indeed, he practically admits this himself. Asked as to why he gave away 200 acres at that time, he answered: "Well, to my children, I must admit I gave the land away." Asked again why he did it, he said, "Well, that is the question now." "Well, I wanted them to have the farm." And when the question was whether he wanted them to have it rather than his creditor, the appellant, he answered: "Well, I can't answer that question at all." "Well, I don't know."

Whether the evidence shows the deeds to have been fraudulent as to the appellee Ann Enright, is a more difficult question. It is alleged in the complaint that the deed to her and that to their son, Levi, were without consideration. It is also there alleged that at the time of said conveyance to her by her husband, as well as at the time of the conveyance by her and her husband to their son, Levi, the facts in relation to these transfers, which include the fact of her husband's "intent to cheat, hinder, and delay his creditors," were "fully known" to her, as well as to her said husband and son. If either of these allegations, the want of consideration for the deeds, or the knowledge on her part of the fraud about to be practiced on appellant and other creditors of her husband, were established by the evidence, then the law would impute fraud also to her, and the deeds should be set aside.

The evidence shows that the land was held in John Enright's name for nearly twenty-two years before he conveyed it to his wife, and that there was no con-

The First National Bank of Frankfort, Indiana, v. Smith et al.

sideration then paid to him for the deed to her. She even testified that she was not present when the deed to her was executed, and that she did not know anything about her husband having executed a deed to her until he handed it to her. In the light of this testimony, the deed to Ann Enright would look very much like a voluntary conveyance.

If the deed to Ann Enright was fraudulent as to her, then the deed by her and her husband to their son, Levi, was confessedly fraudulent also, and that as to all the parties, for it is admitted that there was no consideration whatever for the deed to him.

On January 28, 1896, the day on which the first of the renewal notes in suit was executed, John Enright filed in the circuit court, as replevin bail, in a cause there pending, his affidavit that he was worth, in unincumbered real estate, over and above all indebtedness, the sum of ten thousand dollars. So far as the public records then showed, he might well take this oath. Those records represented him to be the owner in fee simple of 400 acres of land, with no lien whatever standing against it; and it is admitted that this land was then worth \$40.00 an acre, except sixty acres, which was worth \$35.00 an acre; in all about \$16,000.00 worth of unincumbered real estate. In less than two months he had completely stripped himself of his property. On March 25, he deeded to his wife 200 acres without consideration then paid. On the same day he and his wife deeded to one daughter 140 acres additional, admitted to be wholly without consideration. Again, on the same day, there was placed on record a deed to another daughter for the remaining 60 acres. It is shown that this last deed was executed by him, without his wife joining, on the 27th of November previous, on which day was also executed by him alone a deed to the other daughter for

The First National Bank of Frankfort, Indiana, v. Smith et al.

the 140 acres, redeeded to her by him and his wife on March 25, as already stated. All the deeds to the daughters were wholly without consideration, except what is shown by the relationship of the parties.

Counsel may well admit, as they practically do, that this whole series of transactions was tainted with fraud. But it is insisted that Ann Enright, the wife, was not a participant in the fraud, that she knew nothing of the false representations made by her husband, or that he was indebted to the appellant or to any one else, or that any one had given her husband credit by reason of his ownership of the land, as shown upon the public records. It must be confessed that counsel for appellant has not pointed out any positive or satisfactory evidence in opposition to the claim of innocence so made in favor of Ann Enright, nor have we been able to find any such evidence, though we have carefully read the record. It does seem strange that she should be entirely ignorant of this wholesale scheme of fraud, but she and her husband both swear positively that she had no part in it, and we have been unable to find any evidence in contradiction of their positive testimony, however improbable that testimony may seem.

Neither do we think that appellant has established the allegation that the deed to Ann Enright was wholly without consideration. Some of the money that came to John and Ann Enright from her father's estate is unquestionably shown to have been a gift to the husband. The first money so coming to them she testified was her "dowry" from her father; and she says further that she used a part of this herself, and gave the remainder to her husband, and that it was mostly used to buy furniture. That money, consequently, constituted no part of any debt from the husband to the wife, and furnishes no support to the

claim of consideration in the deed made to her. Again, in a purchase of land made by John Enright it appeared that a debt on the land for \$1,000.00 was due to Ann Enright's father, and that he canceled the lien created by that debt by way of advancement to his daughter, so that John Enright obtained the land for \$1,000.00 less than its full value. This also did not make John Enright a debtor to his wife. It was, in substance, a gift to John Enright himself. See *Lewis v. Stanley*, 148 Ind. 351. And in the final distribution of the estate of Ann Enright's father a note was given to her husband, on which was realized \$336.62. This, too, so far as the evidence discloses, was a gift to John Enright, and constituted no debt by him to his wife. As to a distribution to them of \$1,300.00, the evidence is very indefinite. Ann Enright testified that she did not know what became of it; that she thought it went into a purchase of land made by her husband. She even said positively, "I never had it in my possession, I know that."

If the foregoing were all the evidence in support of a consideration for the deed to Ann Enright by her husband, it would clearly have been quite insufficient. But as to \$650.00 given to her by her father in 1869, the case is different. The evidence by her and by her husband is positive, and the same is corroborated by her brother, that this money was received by her from her father, and that it was given by her to her husband in trust for her. She says, "I told him I wanted him to take that and take care of it for me." And John Enright says, "I told her I would take care of it for her." Then, as to the deed itself, her testimony is, "Well, he gave it to me for the money that he had received from my estate, and he had always promised that he would give me back the money." He said, as

The First National Bank of Frankfort, Indiana, v. Smith *et al.*

to the same matter, "I deeded it to her because I owed her, and wanted to pay her."

But, conceding that it is thus shown that John Enright held \$650.00 of his wife's money in trust for her, and that the deed to her was made in satisfaction of this obligation, the question arises whether the consideration was sufficient as against creditors. The land was worth about \$8,000.00, and the only legal consideration for the conveyance was this \$650.00.

If the wife paid nothing for the deed, the law would treat the transaction as showing positive fraud against the creditors on the part of the husband. Moreover, for reasons of public policy, and to protect the rights of creditors, the law would also treat the sale as constructively fraudulent on the part of the wife, even though no actual fraud were brought home to her. "Although she may not be actually a party to the fraud of her husband, yet," as said in *Roberts v. Farmers', etc., Bank*, 136 Ind. 154, "she is affected by all the equities which might be enforced against him, and the conveyance will be set aside."

It does not seem that the rule could be different in case the consideration were merely nominal, or even where, though considerable in amount, it should be yet wholly inadequate as compared with the value of the property conveyed. Not only, therefore, ought the inquiry be as to whether the purchaser made any payment, but also as to whether the payment made was a reasonably adequate price for the property, or whether it was so grossly inadequate as to shock our sense of natural justice. *Brookville National Bank v. Kimble*, 76 Ind. 195, 202; *Fulp v. Beaver*, 136 Ind. 319; *Prosser v. Henderson*, 11 Ala. 484.

In Wait, *Fraud. Conv.* (3d ed.), section 209, it is said: "The consideration must be adequate; not that the courts will weigh the value of the goods sold and

The First National Bank of Frankfort, Indiana, v. Smith *et al.*

the price received, in very nice scales, but after considering all the circumstances they will hold that there should be a reasonable and fair proportion between the price and the value."

In *Sandman v. Seaman*, 84 Hun 337, 32 N. Y. Supp. 338, a conveyance by a husband to his wife of property worth \$5,000.00, subject to a mortgage for \$1,000.00, and for a consideration of \$1,000.00 additional was set aside. In *Wilson v. Jordan*, 3 Woods (U. S. Cir. Ct.) 642, where the value was \$7,700.00, and the estimated consideration \$1,537.00, the transaction was held to be conclusively fraudulent. It was there said, "The difference between the property conveyed to her and the consideration paid 'was so great as to shock the common sense of mankind, and furnish in itself conclusive evidence of fraud,'" citing *Kempner v. Churchhill*, 8 Wall. 362; *Ratcliff v. Trimble*, 12 B. Monroe, 32; *Borland v. Mayo*, 8 Ala. 104.

In *Smith v. Selz*, 114 Ind. 229, this court, speaking by Judge Mitchell, said: "In the exercise of its flexible jurisdiction, a court of equity may set aside a conveyance as fraudulent in law, when the disparity between the actual value of the property conveyed and the purchase price is so great as to be legally injurious to the creditors, and to constitute a fraudulent diversion of the debtor's property, or it may, under like circumstances, compel the purchaser to account for the difference in value."

In the case at bar, the learned judge who presided may have been of opinion that all the property that came to the husband from the estate of his wife's father, amounting to about \$3,500.00, might be considered as the consideration for the \$8,000.00 farm deeded to her. If that were true, and if we should deduct the wife's inchoate interest in the land from the total value, there would not then seem to be such

The First National Bank of Frankfort, Indiana, v. Smith *et al.*

a disparity between the value and the consideration as would "shock the common sense of mankind." But a consideration of \$650.00 appears totally inadequate for a farm worth \$8,000.00, even subject to the wife's inchoate interest. The disparity is much greater than in the cases of *Sandman v. Seaman* and *Wilson v. Jordan*, above cited, and we think there is, therefore, greater cause for setting aside the conveyance as against the rights of *bona fide* creditors. Nor, although the wife is not shown to have had any positive knowledge of her husband's fraud, can we close our eyes altogether to the fact that she knew that at the time of this conveyance he dispossessed himself suddenly of all his property, being 400 acres of unincumbered land, worth nearly \$16,000.00. This should have aroused some suspicion in her mind, particularly when her own deed for 200 acres was presented to her without any previous intimation that it was to be given to her.

We think that this is such a case as was perhaps in the mind of the court in *Smith v. Selz*, *supra*, where it was further said that if the "property has been purchased from a failing debtor, without any positive fraud on the part of the purchaser, and yet under such circumstances as make it highly injurious and inequitable as to creditors that the transaction should stand, a conveyance may be set aside upon such terms as will protect a purchaser whose purchase is only constructively fraudulent;" that is, "upon the condition that the equities of the purchaser who was guilty of no actual fraud be protected." Not only should Ann Enright's inchoate interest in her husband's land be guarded, but also the debt of \$650.00 due her from her husband, as also other debts due her by him, if any, that formed a part of the consideration. Her rights as to these interests in the land are quite as

Haney v. Farnsworth, et al.

sacred as those of the appellant. In addition, it is to be remembered that the deed is good as between the parties, and is void only as to the creditors. "Satisfy the creditors and the conveyance stands," as said by Judge Story, cited in *Kitts v. Willson*, 140 Ind. 604.

Judgment reversed, with directions to grant a new trial.

HANEY v. FARNSWORTH ET AL.

[No. 18,266. Filed February 15, 1898.]

149	453
6153	386

APPEAL AND ERROR.—*Special Bill of Exceptions.—Statute Construed.*

—Under the provisions of section 642, Burns' R. S. 1894 (630, R. S. 1881), that either party may reserve any question of law decided by the court during the progress of the cause for the decision of the Supreme Court by a special bill of exceptions, questions of mixed law and facts cannot be thus presented, nor questions arising after the evidence was heard and the court's finding announced.

From the DeKalb Circuit Court. *Affirmed.*

W. W. Sharpless, Daniel M. Link and F. S. Roby,
for appellant.

C. A. O. McClellan and D. A. Garwood, for appellees.

HACKNEY, J.—The appellant seeks to present questions in this court upon a special bill of exceptions, according to the practice provided by section 642, Burns' R. S. 1894 (630, R. S. 1881). The record recites a trial and finding for the appellees, a motion for a new trial, with notice of an intention to appeal from an adverse decision upon the motion, the overruling of said motion, a judgment for appellees, and a special bill of exceptions.

The bill contains certain facts, evidence, and conclusions, but does not purport to set forth all the evidence. The one contention on the part of the appellant is that, upon such facts the court should have

Haney v. Farnsworth et al.

found for him, and should therefore have granted a new trial. It will be observed that, if the question were presented by special findings, it would be as to the sufficiency of the facts, excluding mere evidence, to support a conclusion of law in favor of the appellees; and, if presented by the usual bill, it would be as to the sufficiency of the evidence to support the finding in favor of the appellees, or that the finding in favor of the appellees was contrary to the evidence. In any event, the question would be one of mixed law and fact, and such questions cannot be presented under the statute cited (*Woodard v. Baker*, 116 Ind. 152); not only a question of mixed law and fact but a question arising after the evidence was heard and the court's finding was announced, and one first presented upon and by the motion for a new trial, questions we held, in the case cited, not to arise, "during the progress of the cause," within the meaning of the statute cited. It was not contemplated by this statute that questions depending upon the weight and sufficiency of the evidence should be presented by the practice therein provided, nor that the mere application of the law to the facts in a case, as in special findings, should be presented in the manner here attempted. If a question of evidence, all of the evidence should be in the record; and, if a question upon special findings, exceptions to the conclusions of law, which admit the facts found, should be reserved. The record not properly presenting any question, the judgment is affirmed.

Fritch v. Patterson et al.

FRITCH v. PATTERSON ET AL.

[No. 18,506. Filed February 15, 1898.]

149 455
164 668
164 669

HIGHWAYS.—Establishment.—Evidence of Public Utility.—The ultimate fact of public utility in a proceeding to locate and establish a public highway, on appeal from the board of commissioners to the circuit court, is to be determined from all the evidence relative thereto by the court or jury trying the issue, and it is not necessary that such fact be proved by direct evidence, but it may be inferred from all the legitimate facts and circumstances in evidence. *pp. 456, 457.*

SAME.—Establishment.—Evidence of Public Utility.—It is not essentially requisite in a proceeding to locate and establish a public highway that it be shown that the proposed road will be used by the whole community or by a large part thereof, if it appears that the road will be of public convenience, the mere fact that it will specially facilitate the convenience of one or more persons over that of others, will not deprive it of its public character or utility. *p. 457.*

SAME.—Establishment.—Necessity.—Evidence of Public Utility.—Where it is shown by the evidence that public convenience requires that a proposed highway be established it will be held to be of public utility although it may not appear to be of absolute necessity. *p. 457.*

EVIDENCE.—Weight Of.—Where there is evidence sufficient to support the finding of the trial court the Supreme Court will not weigh the evidence for the purpose of ascertaining the preponderance thereof. *p. 457.*

From the Martin Circuit Court. *Affirmed.*

W. H. DeWolf, for appellant.

O. H. Cobb, for appellees.

JORDAN, J.—Appellees petitioned the board of commissioners of Knox county to locate and establish a certain described public highway in Palmyra township in that county. The commissioners appointed viewers who made a favorable report, and thereupon the appellant filed a remonstrance alleging therein that the proposed road was not of public utility, and that he would be damaged by the location of the road.

Fritch v. Patterson et al.

Reviewers were appointed by the board, and they reported that the road would be of public utility, and awarded damages to the appellant in the sum of \$40.00. This report was confirmed by the board, and the road ordered to be opened. Appellant appealed to the Knox Circuit Court, and on his application the cause was venued to the Martin Circuit Court, where a trial, by the court, resulted in a finding that the highway was of public utility, and that appellant was entitled to damages in the sum of \$50.00, and, over his motion for a new trial, judgment was rendered accordingly. The error assigned is that the court erred in overruling the motion for a new trial, and the only grounds upon which counsel for appellant bases his claim for a reversal of the judgment are: First, that the evidence does not show that the highway will be of public utility; second, that the damages awarded are not sufficient. The highway in dispute is 900 feet or over in length, and connects with two other public roads. Five or six witnesses testified to facts tending to prove the public convenience or utility of the road, as against one witness introduced on the part of the appellant upon this issue. There is evidence showing that the proposed road will better and more conveniently enable persons in the vicinity thereof to reach the railroad station for the purpose of shipping stock and other products, etc., and will afford better facilities to the public than the old road, which, as some of the witnesses stated, is too narrow. The learned counsel for appellant seemingly does not deny but what the evidence proves that the road will be of some public utility, but insists that public utility does not require that it be established. The ultimate fact of public utility in cases of this character on appeal to the circuit court is to be determined by the court or jury trying the issue from all the evidence relative

thereto; and it is not necessary that this fact be proved by direct evidence, but it may be inferred from all the legitimate facts and circumstances in evidence. *Hagaman v. Moore*, 84 Ind. 496. It is not essentially requisite to the proof of the disputed question of public utility in proceedings like these, that it must be shown that the proposed road will be used by the whole community, or, in fact, by a large part thereof. If it appears that it will be of public convenience, then the mere fact that it will specially facilitate the convenience of one or more persons over that of others, will not deprive it of its public character or utility. *Elliott on Roads and Streets*, 7; *Ross v. Davis*, 97 Ind. 79. Possibly it might be said that there was no absolute necessity for the road in controversy, but there are facts and circumstances in evidence from which it may be inferred that public convenience required that it be established as proposed, and it may be asserted as a correct legal proposition that what the convenience of the public requires, is of public utility, although it may not appear to be of absolute necessity. *Green v. Elliott*, 86 Ind. 53. As there is evidence sufficient to support the finding of the court on the question that the highway will be of public utility, we can not undertake to weigh it, but must accept the conclusion reached by the lower court on this issue. *Moore v. Auge*, 125 Ind. 562.

There is evidence which fully supports the finding of the court upon the assessment of damages, and we cannot disturb the judgment on this feature of the case. Judgment affirmed.

Jones, Executor, v. Henderson *et al.*

149	459
160	643
160	644
149	459
161	273

JONES, EXECUTOR, v. HENDERSON ET AL.

[No. 18,016. Filed February 16, 1898.]

APPEAL AND ERROR.—*Appeal Bond.*—*Motion to Dismiss for Failure to File.*—*Delay.*—*Waiver.*—Where a motion to dismiss an appeal on account of failure of appellant to file an appeal bond is delayed until a year has elapsed from the rendition of the judgment appealed from, and until after appellees have joined in error and filed briefs upon the merits of the appeal, such conduct will constitute a waiver of the right to move for the dismissal. *p. 459.*

LIMITATION OF ACTIONS.—*Trusts.*—Express or direct and continuing trusts are not within the statute of limitations. *p. 461.*

SAME.—*Trusts.*—*Action to Recover Trust Funds.*—A trust deed or mortgage executed by a water works company to trustees, conditioned that all money that the trustees at any time might derive from any of the mortgaged property or "from the foreclosure and sale thereof shall be held by them as trustees for the benefit of all bondholders of said bonds *pro rata*" created a trust relation, not only as to the property and the foreclosure of the mortgage, but also as to the reception and holding of the proceeds of the sale under such foreclosure, and while such relation existed the possession of the trustees is regarded as that of the *cestuis que trust* and the statute of limitation will not operate as a bar to an action by the *cestuis que trust* for the recovery of such funds. *pp. 459-466.*

SAME.—*Trusts.*—*Laches.*—Laches by a *cestui que trust* to constitute a bar to an action against the trustee for the recovery of the trust funds arises from conduct inconsistent with the existence of the trust, or the continuance of the trust relationship, and never obtains where the existence and continuance of the trust are undoubted. *p. 466.*

From the Marion Superior Court. *Reversed.*

S. N. Chambers, S. O. Pickens, C. W. Moores, and Pirtle & Grabue, for appellant.

Ferdinand Winters, for appellees.

HACKNEY, J.—This was a suit by the appellant against the appellees, as heirs at law and devisees of William Henderson, deceased, to enforce a debt of said decedent against the property received by them from the estate of said decedent. The first question

Jones, Executor, v. Henderson *et al.*

before us arises upon the motion of the appellees to dismiss the appeal for the reason that no appeal bond was filed. No question is made but that the appeal was under the act for the settlement of decedent's estates. Section 2609 *et seq.*, Burns' R. S. 1894 (2454 *et seq.*, Horner's R. S. 1897). Ordinarily, the failure to give bond as required by said act is cause for the dismissal of the appeal. *Harrison Nat'l Bank v. Culbertson*, 147 Ind. 611; *Beaty v. Vories*, 138 Ind. 265; *Galentine v. Wood*, 137 Ind. 532; *Webb v. Simpson*, 105 Ind. 327.

The motion in this case was not filed until after the appellees had joined in error, had filed briefs upon the merits of the appeal, and had delayed more than one year from the rendition of the judgment appealed from. Such conduct has been held a waiver of the right to move for a dismissal of the appeal. *State v. Walters*, 64 Ind. 226; *West v. Cavins*, 74 Ind. 265; *Gilbert v. Welsch*, 75 Ind. 557; *Bender v. Wampler*, 84 Ind. 172; *Hillenberg v. Bennett*, 88 Ind. 540; Elliott's App. Proc., sections 249, 376; Ency. Pl. and Prac., p. 1000. The only Indiana case at variance with the authorities cited is that of *Ten Brook v. Maxwell*, 5 Ind. App. 353. which was decided without reference to the decisions of this court upon the question. In some courts it is held, in accordance with the case just cited, that the bond is jurisdictional, and may not be waived. That rule, however, is not in harmony with our numerous holdings. The motion must therefore be denied.

The remaining question is upon the action of the court in overruling the appellant's demurrer to the answer of the appellees pleading the six years statute of limitation. The complaint alleged that in June, 1870, William Henderson and James M. Ray were constituted trustees for the bondholders under a trust deed or mortgage executed by the Water Works Com-

Jones, Executor, v. Henderson et al.

pany of Indianapolis; that the bonds, to the amount of \$350,000.00, were made payable to said named trustees, with interest payable semiannually, and due in July, 1890, and were secured by said trust deed or mortgage; that three of said bonds, each for the sum of \$1,000.00, and numbered, respectively, 166, 167, 168, became and continued the property of the appellant's testator; that Ray died in 1880, leaving Henderson as the sole trustee; that in March, 1881, default having been made in the payment of the interest on the bonds, and Henderson, as such trustee, having instituted suit upon said bonds and to foreclose said mortgage, according to the stipulations of said mortgage, obtained judgment upon all of said bonds, including those held by the appellant's testator, and a decree foreclosing said mortgage; that the mortgaged property was sold to satisfy said decree, and, on the 20th day of April, 1881, the proceeds of the sale were paid to said Henderson, trustee, including \$12,608.62, the amount due upon bonds numbered 166, 167, 168, and eight other bonds not delivered up for cancellation.

One of the stipulations of said mortgage, as to said trustees, was that "all money that they may at any time derive * * * * from the foreclosure and sale" of said property, "shall be held by them as trustees for the benefit of the holders of said bonds pro rata, and shall be apportioned and paid to them accordingly."

At the time of the receipt of said sum from the sheriff said Henderson executed receipts in writing, acknowledging the receipt of said special sum in full and on account of said eleven bonds, signing said receipts, respectively, "W. Henderson, trustee," and "W. Henderson, trustee W. W. Co." It was alleged that Henderson held, until his death, the proportion of said sum owing upon said bonds 166, 167, and 168, and

that the same was never paid to appellant's testator, who, during his lifetime resided in the state of Kentucky, and who died in January, 1892, in said state; that Henderson's estate was settled in March, 1895, and money and property sufficient to pay appellant's demand was received from said estate by the appellees.

Do these facts present a demand subject to the statute of limitations? For the appellant it is contended that the trust relation created by the deed or mortgage was not subject to the statutory limitation, while the appellees insist that, as to the proceeds of the sale, there was no trust relation; that Henderson became a debtor, in the ordinary sense, to the bondholders, which gave only an action at law for money had and received; and that, if a trust relation existed, it was such as was subject to the statute of limitations.

One proposition thoroughly settled is that express or direct and continuing trusts are not within the statutes of limitation. Beach Mod. Eq., section 155; 13 Am. and Eng. Ency. of Law, page 683; *Raymond v. Simonson*, 4 Blackf. 77; *Smith v. Calloway*, 7 Blackf. 86; *Albert v. State, ex rel.*, 65 Ind. 413; *Board, etc., v. State, ex rel.*, 103 Ind. 497; *Thomas, Admr., v. Merry*, 113 Ind. 83; *Langsdale v. Woollen*, 99 Ind. 575; *State, ex rel., v. Board, etc.*, 90 Ind. 359; *Parks v. Sattertwate*, 132 Ind. 411; *Peebles v. Green*, 6 Lea. (Tenn.) 471; *Speidell v. Henrici*, 15 Fed. 753, n. p. 758; 1 Am. Jur. (N. S.), p. 349; 2 Perry on Trusts, section 863; *Talbot, Admr., v. Barber*, 11 Ind. App. 1; *Jackson v. Landers*, 134 Ind. 529.

In 13 Am. and Eng. Ency. of Law, *supra*, it is announced as "a well established rule that as between a trustee of an express trust and his *cestui que trust*, 'no statute of limitations nor any bar by analogy to the statute can be relied on,' "citing many authorities.

Jones, Executor, v. Henderson *et al.*

In Beach Mod. Eq., *supra*, it is said "length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*." In *Raymond v. Simonson*, *supra*, it is said, "The sound rule then is, that the trusts not reached or affected in equity by the statute of limitations, are technical and continuing trusts, of which courts of law have no cognizance."

Some of the authorities cited, and many others declare the trust so exempt from the statute of limitations to be those of exclusive equitable cognizance, or that, where the remedy of the *cestui que trust* is alike subject to enforcement at law and in equity, the latter jurisdiction will apply the limitations applicable in the former.

Another exception to the general rule, affirmed in the authorities cited, is that where there has been an open denial of the trust by the trustee, and notice thereof to the *cestui que trust*, the statutory limitation will be applied as beginning with the time of such denial and notice. This exception, however, finds its support in the conclusion that the trust relation no longer continues, since it is of the essence of the rule stated that the trust is a continuing one.

The first of these two exceptions to the general rule, stated to exist where the *cestui que trust* has concurrent remedies at law and in equity, has application only where the trust, being an express trust, has been discontinued, or the remedy sought is not the enforcement of such trust or its incidents. That the statute, to become a bar, depends upon the broken continuity of the trust, was expressly recognized by this court in *Albert v. State*, *supra*; *Parks v. Sattertwate*, *supra*; *Raymond v. Simonson*, *supra*, and other cases. In the last cited case it was said: "So long as such a trust as that

Jones, Executor, v. Henderson *et al.*

is continuing as a trust, acknowledged or acted on by the parties, the statute cannot apply."

This is proved by the indisputable rule that the enforcement of such trusts is of exclusive equitable cognizance, and never exists concurrently at law and in equity. As said in 27 Am. and Eng. Ency. of Law, p. 271, "The enforcement of trusts and many of the rights incident thereto is, of necessity, altogether within the jurisdiction of courts of equity; indeed, it is difficult to conceive of a case directly involving the administration of a trust of which a court of common law could properly take cognizance. The execution and enforcement of trusts and trust obligations, the adjustment of disputed rights under them, the investigation and settlement of accounts between parties in confidential relations, the establishing of the existence of a fiduciary relationship, are questions which fall naturally within the primary and exclusive jurisdiction of the chancery courts," citing many authorities.

A *cestui que trust* cannot maintain an action at law against a trustee while the trust is still open. His only remedy is by bill in equity. *Davis v. Coburn*, 128 Mass. 377. The jurisdiction of chancery over trusts can be taken away only by showing a complete execution of the trust. *Jordan v. Jordan*, 2 L. Repos. (N. C.) 292. See, also, to the same effect, *Thomas v. American, etc., Co.*, 47 Fed. 550; *New England, etc., Co. v. Gay*, 33 Fed. 636; *Alexander v. Mortgage Co.*, 47 Fed. 131; *Coates v. Woodworth*, 13 Ill. 654; *Haywood v. Ensley*, 8 Hump. (Tenn.) 460; *Brown v. Wright*, 4 Yerg. (Tenn.) 57; *Trustees of McIntire, etc., v. Zanesville, etc., Co.*, 9 Ohio 203; *Duwall v. Craig*, 2 Wheat. (U. S.) 45; *Parks v. Sattertwaite*, *supra*.

There is no pretense in this case that the trust, if one existed in the holding of the proceeds of the sale, was ever repudiated, or otherwise discontinued, and

Jones, Executor, v. Henderson et al.

it would, therefore, not fall within either of said exceptions to the general rule stated. Was there an express continuing trust, as to the holding of said funds, Henderson being the trustee, and the bondholder the *cestui que trust*? The deed or mortgage expressly stipulated that all moneys that the trustees might at any time derive from any of the mortgage property or "from the foreclosure and sale thereof, shall be held by them as trustees for the benefit of all bondholders of said bonds *pro rata*, and shall be apportioned and paid by them accordingly." The receipts to the sheriff, designating the bonds of appellant's testator, were by Henderson as trustee.

Little doubt can exist that the object of the parties in creating a trustee for the bondholders was that their interests in the collection of the mortgage indebtedness, and the retention, preservation, and final distribution of the fund, might be protected and accomplished without calling together and securing united action by the bondholders individually.

As little doubt can exist that the language of the instrument created a trust relation not only as to the property and the foreclosure of the mortgage, but also as to the reception and holding of the fund. That relation is not shown to have discontinued. Counsel do not contend that it was ever discontinued, and it would be most difficult, under the facts before us, to point to a time when it ceased. "And while the relation of trustee and *cestui que trust* continues unbroken, the possession of the trustee is regarded as that of the *cestui que trust*." In the very nature of such relation, and under this presumptive possession, the statute of limitations could not run.

The beneficiary cannot be said to have slept upon his rights to relief against a trustee in a court of equity until a position of antagonism or defiance of

Jones, Executor, v. Henderson et al.

his rights has, with his knowledge, been assumed by the trustee; and the mere retention of a portion of the income of the trust fund by the latter, with the consent of the beneficiary, and without any claim of right, does not produce such hostile attitude. *Dyer v. Waters*, 46 N. J. Eq. 484, 19 Atl. 129; *Crisfield v. State*, 55 Md. 192. In the latter case it was said: "The fact that money due to a *cestui que trust* is allowed to remain in the hands of a trustee with the consent of the *cestui que trust*, does not change the nature of the debt itself. It still remains a debt due by the trustee in his character as trustee."

In *Raymond v. Simonson*, *supra*, the following proposition and authorities were stated and cited with approval: "Lord Redsdale, in the case of *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630, says, that if the trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance be that the trustee, from mere negligence or unwillingness, does not perform his trust, his possession will not operate as a bar; because his possession agrees with his title, and also with the rights of the *cestui que trust*. * * * * It is also stated by Sir William Grant in several cases, that time does not bar a direct trust as between the trustee and the *cestui que trust*, upon the precise same principle that applies at common law to tenants in common, where the statute does not run but from the time of actual ouster, because the possession of the one is not adverse to the rights of the other, but is in support of the common title."

In *Havens v. Church*, 104 Mich. 135, 62 N. W. 149, where moneys were held upon agreement to remove an incumbrance from lands, or pay them to the purchaser of the lands when he should pay the incum-

McCue v. McCue.

brance, it was held that such moneys were held in trust, and that the statute of limitations would not begin to run until an accounting was called for.

It is earnestly insisted also by the appellees' learned counsel that laches is an equitable bar to the suit of the appellant. No affirmative pleading by the appellees sets up this form of estoppel, and, if we were permitted to carry the demurrer to the answers back to the complaint, we could not say that facts did not exist in favor of the appellant excusing the delay. However, from the authorities already cited, we are impressed that the laches which courts of equity accept as a bar arises from conduct inconsistent with the existence of a trust, or the continuance of a trust relationship, and never obtains where the existence and the continuance of the trust are undoubted. Any other rule would be at war with the conclusions that, as long as the trust relation continues, the possession of the trustee is the possession of the *cestui que trust*.

The judgment of the lower court is reversed, with instructions to sustain appellant's demurrer to appellees' answer.

McCUE v. McCUE.

[No. 18,411. Filed February 16, 1898.]

DIVORCE.—Allowance Made to Wife During Pendency of Action.—Discretion of Court.—The trial court has power in divorce cases to make such allowances and orders as may be deemed necessary to enable the wife to prepare for and secure a fair and impartial trial, and also for her support during the pendency of the action, and such orders are within the discretion of the court and will not be reversed unless a clear abuse of such discretion is shown. p. 467.

SAME.—Allowance Made to Wife.—Evidence.—Sufficiency.—Evidence given in a divorce suit in support of an interlocutory order for an allowance of \$100.00 for the use and support of the wife during the pendency of the suit, to the effect that plaintiff had been compelled.

McCue v. McCue.

by her husband's cruel and inhuman treatment and failure to make any provision for her support, to abandon him; that she was wholly destitute and owned no property except a small house and lot from which she derived an income of but little more than enough to pay repairs and taxes thereon, and that defendant was worth almost \$10,000 and amply able to pay such sum, was sufficient to sustain the action of the court in making such allowance. *pp. 467, 468.*

DIVORCE.—*Allowance Made to Wife During Pendency of Action.*—

Answer.—An answer by defendant to an application by plaintiff for an allowance for her support during the pendency of a divorce proceeding, alleging that he had furnished a house and proper support for plaintiff and that he was willing for her to return to his home, and that he would furnish her with comfortable maintenance, was properly disregarded by the court where plaintiff alleged in her complaint that she had been compelled by her husband's cruel and inhuman treatment, and by his failure to make any provision for her support, to abandon him. *pp. 468-470.*

From the Johnson Circuit Court. *Affirmed.*

David L. Wilson, Will A. Yarling, R. M. Miller and H. C. Barnett, for appellant.

William A. Johnson, for appellee.

MONKS, J.—Appellee sued appellant for a divorce. On application of appellee the court ordered that "appellant pay the clerk of the court below \$100.00, within fifteen days, for her use and support during the pendency of the case." From this interlocutory order appellant appealed.

In this State the court has the power, in divorce cases, to make such allowances and orders as may be deemed necessary to enable the wife to prepare for and secure a fair and impartial trial, and also for her support during the pendency of such action. *Sellers v. Sellers*, 141 Ind. 305. Such orders are within the discretion of the trial court and will not be reversed unless there has been a clear abuse of such discretion. *Sellers v. Sellers supra*, p. 307, and cases cited; *Gruhl v. Gruhl*, 123 Ind. 86.

The evidence given on behalf of appellee was that

McCue v. McCue.

she had been compelled, by appellant's cruel and inhuman treatment, and his failure to make any provision whatever for her support, to leave him; that she was wholly destitute, and owned no property whatever except a small house of the value of \$400.00 and no more, and \$10.00 balance on some property, not yet due; that from said house and lot she derived an income of only \$5.00 per month, that being but little more than enough to keep up the repairs and pay the taxes thereon; and that she could not sell, mortgage, or borrow any money on the same, or otherwise get any money, and that she had no other property or credit, and could not live on the income thereof, and, aside therefrom, is wholly destitute of the means to support herself during the pendency of the action, or of defraying the costs, expenses, and attorney's fees attending the preparation of said cause; that she is fifty-four years of age and is afflicted with rheumatism, and wholly unable to work or labor; that appellant owned personal property of the value of \$2,000.00, and unincumbered real estate of the value of \$7,500.00, and was amply able to pay such sum as would be necessary for appellee's support during the litigation and in preparation for the trial of said cause. The evidence given on behalf of appellee was amply sufficient to sustain the action of the court in making the interlocutory order appealed from. *Sellers v. Sellers, supra*, and cases cited; *Davis v. Davis*, 141 Ind. 367; *Yost v. Yost*, 141 Ind. 584; *Gruhl v. Gruhl, supra*.

After appellee's application for an allowance was filed, appellant resisted the same, and on February 22, 1897, filed an affidavit, in which he alleged that he had a furnished house, the family residence, the one said appellee had abandoned, and that he was willing for her to return to said home, and that he would furnish her with comfortable maintenance and support; that

McCue v. McCue.

appellee's house and lot could easily be mortgaged for the sum of \$400.00, and that appellant was willing to join with her at any time in a mortgage on said property for any sum she might desire, and that appellant would within twenty-four hours furnish a party who would loan appellee, on reasonable terms, \$400.00, secured by a mortgage on said house and lot, and would join her in said mortgage; or he would secure for her within that time a purchaser for said real estate at the price of \$500.00 in cash, and join in a deed therefor. This affidavit was read in evidence at the hearing of said application on February 27, 1897.

Appellee was not required to accept appellant's offer of support at his family residence, which she had abandoned on account of the alleged cruel and inhuman treatment by appellant, and his failure to make provision for her support. If the allegations of her complaint and application were true, she had the right to and it was proper for her to abandon such a home. It is true that the truth of these charges did not enter into the determination of appellee's application, but in determining the amount of any allowance it was the duty of the court to take into consideration the nature of the charges in the complaint, as well as the allegations of the answer, and the probability when the same would be tried. Appellant's offer of support at the family residence was properly disregarded by the court.

Appellant's offer to secure a loan for appellee and join in the execution of a mortgage to secure the same, or to procure a purchaser for appellee's real estate within twenty-four hours and join in the deed therefor was made in writing on February 22, 1897, and the application for an allowance was not heard until February 27, 1897, five days afterwards, and there is nothing in the record showing that within said twenty-four

Finley v. Cathcart *et al.*

hours, or afterwards and before the interlocutory order was made that appellant furnished any one to make such loan or purchase said property. The record not showing that appellant made good either of his offers in regard to procuring a loan for appellee or a purchaser for her property, the offers amounted to nothing. It is not necessary, therefore, to determine whether if such offers, or either of them, had been made good the same would have defeated appellee's application for an allowance. Besides, the evidence was conflicting as to whether appellee had credit, or could borrow money or sell her property; and in such case it is well settled that the court will not weigh the evidence, whether the same is given by affidavits or otherwise. *Cabinet Makers' Union v. City of Indianapolis*, 146 Ind. 671, and cases cited; *Henderson v. Henderson*, 110 Ind. 316, 319. This case is clearly within the doctrine declared in *Sellers v. Sellers*, *supra*, and is ruled thereby. No abuse of the trial court's discretion has been shown. The death of appellant since submission having been suggested, the judgment is affirmed as of that date.

FINLEY v. CATHCART ET AL.

[No. 18,847. Filed Nov. 23, 1897. Rehearing denied Feb. 16, 1898.]

PARTITION.—*Judgment.*—*Quieting Title.*—*Former Adjudication.*—In an action by a tenant in common for the partition of his moiety in the real estate so held, no issue was raised between the defendants as to the extent of their respective interests in the real estate, as between each other, where defendants did not appear to such action, but were defaulted, and a defendant therein is not estopped from asserting title to the portion of the real estate set off to her codefendant which she held by an unrecorded deed of conveyance made prior to the partition proceeding. *pp. 471-481.*

APPEAL AND ERROR.—*Rehearing.*—*Petition.*—A petition for a rehearing must state specifically the errors which the petitioner considers

149	470
149	36
149	533
149	470
155	632
156	575
149	470
159	376
149	470
166	256
166	680
167	432
167	616

Finley v. Cathcart *et al.*

the court committed in the former hearing; those not included therein will be deemed waived, and will not be considered. *pp.* 489, 490.

From the Washington Circuit Court. *Reversed.*

Asa Elliott, for appellant.

Harvey Morris, for appellees.

JORDAN, J.—Appellant instituted this action to quiet title to certain described real estate situate in Washington county, Indiana. Appellees Daniel E. Cathcart and wife appeared to the action, and filed an answer in two paragraphs, the first being the general denial. The second set up facts whereby they sought to establish the defense of *res judicata* between the appellant and the appellee Daniel E. Cathcart. Upon the question of title to the lands in dispute by reason of a judgment in an action for partition, wherein the appellant and said appellee were defendants, but were defaulted by reason of their failure to appear. Under the issues joined, the court made a special finding of facts, and stated its conclusion of law adversely to the appellant, and over her objections rendered a judgment against her as to the lands in controversy.

The material facts in the case, as found by the court, are as follows: In 1891, William Cathcart died, at Washington county, Indiana, intestate, the owner in fee simple of eighty acres of land, of which that described in the complaint was a part. He left surviving no widow, but seven children, including the appellant and appellee Daniel E. Cathcart. Appellant, after the death of her said father, appears to have intermarried with one Finley. By virtue of the death of their father, his lands descended to his children in equal parts, and they held the same as tenants in common. In 1892, two of the children conveyed their interest of two-sevenths to the appellant, and in 1893 appellee, Daniel E. Cathcart, by his deed of "general

Finley v. Cathcart et al.

warranty," conveyed his undivided one-seventh in the said tract of land to his sister, the appellant. This deed was delivered, but not recorded. Including the interest which appellant acquired by descent and that which was vested in her by the conveyances heretofore stated, she became invested with, and was the owner of an undivided four-sevenths of the real estate. Some time prior to September, 1896, William F. Cathcart, one of said children, conveyed his one-seventh to one Reyman, who, prior to September, 1896, conveyed the same jointly to Walter, William S., and Stephen S. Mabry. Prior then, to September 14, 1896, said tract of land was held undivided in common as follows: One-seventh by the Mabrys jointly, four-sevenths by appellant, one-seventh each by John M. and Minnie E. Cathcart, the two latter being son and daughter of said William Cathcart, deceased. On the 14th day of September, 1896, the three Mabrys filed a petition for partition in the Washington Circuit Court, making the appellant, Mrs. Finley, John M. Cathcart, Minnie Cathcart, and the appellee, Daniel E. Cathcart, defendants thereto, claiming or alleging in their petition that they, the plaintiffs, each owned one-twenty-first interest in value in the lands, and that appellant, Phalicia A. Finley, owned three-sevenths, and appellee, Daniel E., John M. and Minnie Cathcart each owned one-seventh. All of the said defendants, being duly notified of the pendency of said action, failed to appear and were defaulted, and thereupon the court, on the petition in said proceeding, ordered that the land be partitioned as follows: One-seventh in value jointly to said petitioners, three-sevenths to the appellant, Mrs. Finley, and one-seventh to appellee, Daniel E., and one-seventh each to John M. and Minnie E. Cathcart. Commissioners were appointed by the court, and they partitioned the lands accord-

Finley v. Cathcart *et al.*

ingly, assigning to Daniel E. Cathcart, the appellee, one-seventh of the real estate, which is the same now in dispute. The partition so made was confirmed by the court. The court further finds "that plaintiff, but for said partition record, would own one-seventh in value more than was set off to her in severalty in said action."

In view of these facts, counsel for appellant contends that she is not precluded or estopped by the judgment of the court in the partition action from asserting title to the appellee's interest in the land through his deed of conveyance to her; while on the other hand, counsel for appellee earnestly insists, that as the statute relative to partition proceedings requires the rights and title of the parties to be stated in the petition, and as the petition filed by the Mabrys alleged that appellee's interest was one-seventh and appellant's three-sevenths, and as partition was made accordingly, and confirmed by the court, the question is *res judicata*, and appellant is now estopped by the judgment from asserting through her deed from appellee any claim against him to the one-seventh which had been vested in her by said conveyance prior to the commencement of the action for partition. Or, in other words, the insistence of counsel for appellee virtually is that upon the issues tendered alone by the petition of the plaintiffs in the partition action the court was authorized to order, as it did, under the averments of the petition, that the interests of the several defendants in the land, as therein alleged, be partitioned to each of them in severalty, and thereby conclusively settle, as between each of them, all their rights, title, and interests in and to the premises.

In order to determine the question at issue between the parties to this appeal, an examination of the statute concerning the partition of lands becomes essen-

Finley v. Cathcart et al.

tial, as it certainly will be helpful in arriving at a correct solution of the controversy. Section 1200, Burns' R. S. 1894 (1186, R. S. 1881), provides that, "Any person holding lands as joint tenant or tenant in common * * * may compel partition thereof in the manner provided by this act." The section next following provides that, "Any such tenant may apply to the circuit court, * * * by petition, setting forth a description of the premises and the titles therein of the parties interested." By the next section it is provided that the pleadings, proceedings and practice shall be the same as in civil actions, except as otherwise provided in this act. Section 1203, Burns' R. S. 1894, in part, reads as follows: "If upon the trial of any issue, or upon default, or by consent of parties, it shall appear that partition ought to be made, the court shall award an interlocutory judgment that partition be made to parties who may desire the same, specifying therein the share assigned to each, and taking into consideration advancements to heirs of a person dying intestate; and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition." Section 1207, Burns' R. S. 1894, provides that, "Two or more persons may, if they choose, have their shares set off together." It is evident that any person who comes within the provisions of section 1200, *supra*, when the land is susceptible of division without damage to the owners, may enforce partition, and is entitled to have his interest in the premises assigned to him in kind, and thereby have and hold the same in severalty. But it does not follow in such a case, when one or more co-tenants, as was done in the partition action herein mentioned, petition the court for partition, making other alleged co-tenants defendants, and where the latter are defaulted, and do not appear to answer the

 Finley v. Cathcart et al.

petition, and no cross-complaint is filed by any of them tendering any issue between themselves, and they in no manner express to the court a desire or request to have their respective interests in the premises set off, that the court may, under such circumstances, proceed to order, upon the petition alone, that partition be made among such defendants, and assign to each the interests alleged in the petition, and thereby preclude said defendants, as between each other, as to all their rights, titles and interests in and to the real estate which was the subject of partition. The language of section 1203, *supra*, is, "If * * * it shall appear that partition ought to be made the court shall award an interlocutory judgment that partition be made to *parties who may desire the same*, * * * taking into consideration advancements * * * and the *residue of the premises* shall remain for the persons entitled thereto, *subject to future partition*." (The italics are our own.) In *Pipes v. Hobbs*, 83 Ind. 43, this court, in passing upon the sufficiency of a petition in a partition action, said, "The statute provides that 'the court shall award an interlocutory judgment that partition be made to parties who may desire the same, specifying therein the share assigned to each, * * * and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition.' * * *

"The court needs to know the interest or shares so far as to be able to specify them in making the partition,—the portions that are to be set off, each to the owner or owners thereof desiring partition, and the residue, which is not to be partitioned among its owners, must be known.

"When there are two or more defendants, and the complaint has described the premises and the plaintiff's right and title therein, showing the share which

Finley v. Cathcart et al.

he desires to have assigned to him by partition, it is a sufficient further compliance with the statute to set forth the rights and titles of the parties interested in the residue of the premises as one share owned by them all, leaving the parties entitled to such residue, each of whom should be best qualified to state his individual interest, to seek partition for themselves. If one of such defendants desire that his individual share be set off to him, he has an interest in having the record to indicate that share, and he may state it in his own pleading."

This decision seems to assert a correct rule, and supports us in holding, as we do, under the facts in this case, that it was not essential in the partition action instituted by the Mabrys, in order to award to them the right or relief to which they were entitled, for the court to so extend its order as to direct partition to be also made among the defendants, and order shares corresponding to those recited by the plaintiffs in their petition to be set off in severalty to each of said defendants. But, the court in the case in question having so ordered, and also confirmed the action of the commissioners, in assigning in severalty the alleged interests to the defendants, including appellant and the appellee, the question is, can the appellee, who had divested himself of all interest in the land prior to the action in partition, shield himself behind such judgment, and thereby parry the force and effect of his warranty deed, and succeed in virtually wresting the land from the appellant for his own benefit? It has been repeatedly held by this court that ordinarily a judgment in partition does not settle questions of title unless the same have been directly put in issue by the pleadings; or, in other words, the judgment does not create a new title, nor affect after-acquired titles, but simply divides the premises into separate

shares under the titles existing at the time of partition. This seems to be the doctrine asserted in *Miller v. Noble*, 86 Ind. 527; *Elston v. Piggott*, 94 Ind. 14; *Habig v. Dodge*, 127 Ind. 31. *Vide* Black on Judgments, sections 660 and 661. Ordinarily the presumption is that title is not in issue in a partition proceeding. *Green v. Brown*, 146 Ind. 1.

But it must be accepted as a well affirmed principle of law that a judgment or decree in a partition suit, when the court has jurisdiction over the parties and the subject-matter, is as conclusive between the parties upon all the material issues in the case which the court was called upon to examine, and which, under the pleadings, were tried and determined, as are judgments in other actions. Freeman on Co-Tenancy, section 530; *Isbell v. Stewart*, 125 Ind. 112; *Habig v. Dodge*, *supra*; Freeman on Judgments, section 304; Black on Judgments, *supra*. In fact, it is an essential element or principle underlying the doctrine of former adjudication that the judgment in the former action settles all material issues involved between the parties to that action, and all matters which might have been properly litigated and determined within the issues made or tendered by the pleadings in the case, and to this extent the judgment is not subject to a collateral attack. 1 Van Fleet's Former Adjudication, p. 2; *Faught v. Faught*, 98 Ind. 470. This is the rule asserted and adhered to by this court from *Fischli v. Fischli*, 1 Blackf. 360, down to the present time, and this principle is applicable to final judgments in partition the same as it is to those in other actions. *Watson v. Camper*, 119 Ind. 60. The court or jury trying the cause, however, cannot, in any case, legitimately go outside of the issues under the pleadings, and determine matters not embraced within such issues; and what was not within the latter, although they

Finley v. Cathcart et al.

might have been extended to include it, will not, at least, be presumed to have been conclusively adjudicated. *Griffin v. Wallace*, 66 Ind. 410, and cases there cited. It is affirmed in *Jones v. Vert*, 121 Ind. 140, that a party, to successfully invoke the doctrine of former adjudication, must be one who, in the former action, tendered to the party against whom he invokes it an issue to which the latter could have demurred or pleaded; and, where two or more defendants make an issue with the plaintiff, a judgment determining that issue in favor of the defendant does not settle the question between codefendants. In the case last cited the action was instituted to foreclose a vendor's lien. The defendants sought to avail themselves of the defense of former adjudication, and alleged in their answer that in a former suit prosecuted by one Sterne to foreclose a mortgage, to which action the plaintiff and defendants were party-defendants, the former had set up the lien then in controversy, and the court rendered its judgment against Sterne, the plaintiff, and quieted the title of the defendants to the real estate described in the complaint. It was held that these facts fell far short of constituting a good defense. The court, in passing upon the question, in the course of its opinion, per Mitchell, J., said: "The defendants in the foreclosure suit might possibly have put the validity of the vendor's lien in issue by filing a cross-complaint. *Woolery v. Grayson*, 110 Ind. 149. This does not appear to have been done, and we cannot presume that it was. There does not seem to have been any issue tendered or made, between the defendants. In short, there does not appear to have been any suit pending between them. Any judgment, therefore, that the court may have pronounced, which purported to settle any title, or claim, between the defendants, was *coram non judice*, and void. *McFadden v. Ross*, 108 Ind. 512; *Griffin v. Wallace*, 66 Ind. 410."

Finley v. Cathcart *et al.*

It is asserted in *Wilbridge v. Case*, 2 Ind. 36, that "without an issue, nothing is tried, and, of course, nothing determined, and a judgment in such case should bind neither party." Unless it can be said that the issue raised alone by the petition in the partition suit was sufficient to warrant the court in determining the question of title between appellant and appellees then there was no other issue, as we have seen, under which it could have been decided.

The facts necessary to constitute a cause of action in favor of the Mabrys, and entitle them, under the statute, to a partition of their alleged moiety, it would seem, were that they held and owned the same in the lands described in their petition, undivided, as tenants in common with the defendants. These appear to have been the only material issues which were tendered by the petition to the defendants. All such matters, and all others coming within the material issues in the case, as between the plaintiffs and defendants, must be held to have been settled by the judgment, and as to such matters it would not be open to collateral attack. But it cannot, in reason, be said that the issue so raised by the petition must be presumed and held to have conclusively settled all matters between the defendants. As it appears, none of the defendants filed a cross-complaint, nor in any manner appeared to the action, and requested partition of their interests, and in reality no issue was raised in any way by the defendants as between each other. It is evident, therefore, under such circumstances, in the light of the authorities, that it can be said that the court was not called upon, nor was it relevant for it, to examine into and determine matters of an adverse nature existing between any of the defendants. While it may be conceded that under section 386, Burns' R. S. 1894 (383, R. S. 1881), the defendants, by their de-

Finley v. Cathcart et al.

fault in question, as between them and Mabrys, the plaintiffs, must be deemed to have admitted all the material and traversable averments constituting the cause of action. That such is ordinarily the result of a defendant's default, has been repeatedly decided by this court. But surely the rule cannot be extended so as to justify a holding that appellant, by her default, admitted that she was seized of an interest in the realty of three-sevenths only, and appellee, her codefendant, of one-seventh. In fact, we fail to recognize any features or provisions in the partition statute which can be said, on the default of the defendants in the action instituted by the Mabrys, to have put in issue, *ipso facto*, any title or interest between any of said defendants, so as to warrant the court by its judgment to conclusively adjudicate the same. Decisions of other states, to which we have been referred, were in partition proceedings based upon statutes quite different from our own, and therefore are not influential on the question here involved. The case of *Forder v. Davis*, 38 Mo. 107, in no manner lends support to appellees' contention. The facts in that case were dissimilar from those in this appeal, and the statute under which the partition there involved was made differed, in an essential respect, from our own. It is true, the Missouri statute required the petition to set forth the titles of all the parties interested in the lands, but it also required the court to declare the interests of the defendants in the realty, as well as that of the petitioner, and it made such judgment binding and conclusive as to all parties to the proceedings.

It may be correctly said that the Mabrys by their petition for partition, challenged the defendants, one and all, to set up and avail themselves of any title or matter which would defeat the former in their demands for partition, or which would diminish the

interest which they claimed to have and hold in the real estate; but certainly it cannot be successfully urged that the petition also required or compelled the appellant to present and litigate all matters, rights, and titles as between herself and appellee, and, having failed to do so, she must now, under the circumstances, be held to be precluded by the court's judgment in ordering and confirming partition among the defendants. The contention that, under the facts, such must be the result, in our opinion is destitute of any reasonable support. To affirm such a rule would not only, as we believe, operate mischievously in the future, but would manifestly work an injustice in the case at bar. That defendants in a partition proceeding may, between themselves, by a cross-complaint, settle all legal or equitable rights and titles is well settled. *Martindale v. Alexander*, 26 Ind. 104; *Milligan v. Poole*, 35 Ind. 64; *Ferris v. Reed*, 87 Ind. 123.

Without further extending this opinion, we are constrained to hold that the petition filed by the Mabrys for partition did not put in issue, between appellant and appellees, the title which the former held by the deed from the latter, and therefore, she is not precluded or estopped by the judgment from asserting, as against appellees, her title to the land in dispute through said deed. We must not be understood as holding that, had appellant, under the circumstances, been satisfied with the share assigned to her, and had accepted and acquiesced in such partition, she would not have thereby confirmed the same, and made it effectual between her and the appellee, nor as to what would be her situation were this controversy between her and an innocent purchaser for value from appellee. These questions are not involved, and therefore not decided.

Finley v. Cathcart et al.

It follows that the court erred in its conclusion of law, and the judgment is reversed, and the cause remanded to the lower court, with instructions to restate its conclusion in favor of appellant, and render its judgment quieting her title to the lands in question.

DISSENTING OPINION.

HOWARD, C. J. (Dissenting.)—While agreeing with the greater part of what is said in the principal opinion, I yet find myself unable to join in the conclusion reached by the majority of the court as to the force and effect of the decree rendered in the partition suit. That decree, as I think, was binding upon the appellant as well as upon all other parties thereto, and was a complete estoppel against any right on her part to bring this action to quiet her title to land there set off to appellee.

The appellant and the appellee, Daniel E. Cathcart, are children of William Cathcart, deceased. This action was brought by her to quiet her title to a part of the lands owned by her said father at the time of his death. There are seven children of William Cathcart, and the share of Daniel E. Cathcart, being the undivided one-seventh of the real estate of his said father, or eleven acres, as set off in partition, is the land here in controversy. This land appellant claims was conveyed to her by her said brother by an unrecorded deed, previous to the partition suit; but he claims that the land was set off to him in said partition.

The court finds specially that in 1893, Daniel E. Cathcart conveyed to appellant his said undivided one-seventh interest, but that the deed therefor, though delivered, was never recorded; that, in September, 1896, in a partition suit, to which the appellant and

Finley v. Cathcart et al.

the appellee Daniel E. Cathcart, together with all the other owners of the said lands of William Cathcart, deceased, were made parties, it was alleged in the complaint that this appellant owned three-sevenths interest in said land, instead of four-sevenths, and that the appellee Daniel E. Cathcart owned one-seventh; that this appellant and the said appellee were duly summoned in said suit for partition, but each made default; that the court found the allegations of the complaint to be true, and ordered said lands partitioned and set off in severalty, as stated and prayed for in said complaint; and that the land in dispute here was, in said action, set off to the appellee Daniel E. Cathcart, and the partition so made, confirmed and ordered made effectual by the court, and no appeal has been taken from said judgment. As conclusions of law, the court found that the appellant never owned in severalty the particular land here sued for, and, the partition record being against her, she is now estopped from suing in ejectment for the eleven acre tract.

Appellant seems to occupy an inconsistent position. She claims the eleven acres, as set off by metes and bounds in the partition suit. But in the partition proceedings the eleven acres were set off to her brother Daniel, and not to her. Her remedy, if any wrong were done her, would seem to have been to appear to the partition suit, and assert her claim under the deed from Daniel. Having failed to appear there, and having failed to appeal from the judgment there entered, or to bring any direct attack against such judgment, it must be, as the court concluded, that she is estopped from making claim to the eleven acres there set off to her brother.

It is said that the title to the land in controversy was not put in issue by the partition suit. The record,

Finley v. Cathcart *et al.*

as it seems to me, shows that the title then held by each of the parties was in issue. The complaint, alleged that she was the owner of three-sevenths, in value, of her father's land, instead of four-sevenths, and that her brother was the owner of the one-seventh now claimed by her. She did not appear to that suit, but, by her default, admitted that the allegations of the complaint were true, as, indeed, the court also expressly found. Whatever ownership she then had in the land, was in issue, and before the court for determination; and it was adjudged that she was the owner of three-sevenths only, in value, and the same was accordingly set off to her. If the judgment so entered were not conclusive, the partition suit would be but an idle proceeding.

It is true that title, or, rather, the particular nature and duration of a title, are not in every case in issue in a partition suit. Whether the title is a fee simple, a life estate, a fee for life, a fee encumbered with a lien, or is one held in trust, may not always be put in issue by the pleadings, and so may not be determined in the action. "The decree in partition," as said in *Elston v. Piggott*, 94 Ind. 14, "operates only upon the title held at the time the suit was instituted." After-acquired titles are not affected. Freeman Co-Ten. (2d ed.) section 532; *Kitts v. Willson*, 140 Ind. 604. But provided only, at the time of the partition, one has title and the right of possession to an undivided interest in land, the same may be set off to him in severalty. *Shaw v. Beers*, 84 Ind. 528.

In the case at bar, however, the nature of the title claimed is not in doubt. The eleven acres in controversy were set apart to Daniel E. Cathcart as the equivalent in value of his undivided one-seventh interest as heir of his father. The appellant's claim is that three years previous to the partition a deed had been

made to her by him for said one-seventh interest. There was, therefore, before the court, the simple question of the then ownership of the land, and the right to the possession of the same; and the judgment on the issue so made must be conclusive. Appellant does not pretend that her title to the land, or her right to its possession, is different now from what it was then. But appellee then had both title and the right to possession, or else the judgment of the court must go for naught. Exactly the same question then decided cannot be here again brought up for decision.

In *Isbell v. Stewart*, 125 Ind. 112, partition of lands inherited from a first husband was made between the widow and children, the second husband being also joined as a party. The court ordered the land sold, and the proceeds distributed according to the interests of the parties in the land, except that the widow's portion was put in charge of a trustee, to pay the income to her and her husband during her life, after which her share was to be distributed among the children. On her death the husband sought an order to have one-third of his wife's share paid to him. It was held that the judgment in partition was conclusive as to the interests of the parties, and could not be thus collaterally attacked or modified. "We are not willing," said the court, "to extend the doctrine of such cases as *Avery v. Akins*, 74 Ind. 283; *Utterback v. Terhune*, 75 Ind. 363, and *Miller v. Noble*, 86 Ind. 527, to such a case as this, for we think those cases and the cases following them restrict the effect of a judgment in a partition suit quite as much as can possibly be done under the provisions of our statute." And the court adds, quoting from *Freeman on Co-Ten.*, section 530: "The rule that a judgment is conclusive upon all the issues determined by it, is not the less applicable to judgments in partition than to judgments in any other

Finley v. Cathcart et al.

form or kind of action." See also *Brown v. Grepe*, 135 Ind. 4, and *Irvin v. Buckles*, 148 Ind. 389.

It is said that the appellant and appellee were both defendants in the partition suit, and that, while the issues as between the plaintiff and the defendants in that suit were finally determined, it does not follow that the rights of the defendants as to one another were also determined. And we are referred to cases where an action is brought on contract against two or more defendants, and where such defendants are not precluded afterwards, by independent actions, from determining which of such defendants were principals and which only sureties. As to the cases of this kind, the statute has expressly authorized action for trial of suretyship. Section 1226, Burns' R. S. 1894 (1212, R. S. 1881).

But it may be admitted that if, in any case, the pleadings do not involve a determination of the rights and interests of the defendants as to one another, there is nothing to prevent the bringing of another action to determine such rights and interests. It is simply a question of former adjudication; and if in the original action the issues afterwards sought to be determined were not, and could not be, decided, then the bringing of the subsequent action cannot be held to be a collateral attack upon the first judgment. Thus, in *Jones v. Vert*, 121 Ind. 140, there had been an action for foreclosure of a mortgage of real estate, and one of the defendants had sought, by answer, to set up a vendor's lien as against the plaintiff in foreclosure. It was held that the judgment there entered was no bar to an action afterwards brought by the holder of the vendor's lien to foreclose the same against her codefendants. It is plain that this ruling was correct. While the right of the holder of the vendor's lien, as against the plaintiff in foreclosure, was in

Finley v. Cathcart *et al.*

issue in the first action, and was there determined, there was in that action no issue as to the rights of the defendants among themselves in relation to such vendor's lien. Moreover, it is not necessary that the complaint to foreclose a mortgage should state the nature of the liens claimed by the several defendants thereto. It is sufficient to state simply that they claim some title or interest in the property subordinate to the rights of the plaintiff.

In partition, however, it is different; the statute does require that the complaint shall set forth "a description of the premises, and the rights and titles therein of the parties interested." The then existing rights, titles, and interests of all the parties in and to the land to be partitioned are therefore put in issue by the very pleading prescribed by the statute. Section 1201, Burns' R. S. 1894 (1187, R. S. 1881). So, in *McCarthy v. McCarthy*, 66 Ind. 128, a complaint in partition which "gave a description of the land, and set forth the rights and titles therein of the parties respectively," was held to be a compliance with the requirements of the statute. And in *Shaw v. Parker*, 6 Blackf. 345, the court said: "The order for a partition in such case should ascertain and declare the respective proportions of the common owners of the premises." In support of this last decision was cited the strong case of *Lease v. Carr*, 5 Blackf. 353, in which Dewey, J., with unanswerable argument, set forth the nature and scope of a decree in partition, making the partition "firm and effectual amongst the parties thereto forever." In *Wright v. Nipple*, 92 Ind. 310, it was said, in like manner, that an interlocutory judgment in partition "settles and determines the rights of the parties in the common property, and upon these questions it is final and conclusive." See further Van Fleet Col. Attack, sections 153, 155, 628, 631, 704, and 726.

In addition, the question here is not whether the court might have made a different decree, not whether it might have set off to the defendants in the partition suit all their land in one parcel, subject to a future partition suit, to be brought by them. No doubt this could have been done. But that is not the question before us. The question to be decided in this action is whether the court, having jurisdiction of the persons and the subject-matter in the partition suit, was authorized to make the decree which was actually made, and whether the appellant as a party to that decree, having failed to appeal therefrom, or to take any action to set it aside, may now make this collateral attack upon it.

In Missouri, as in this State, the statute requires that the complaint for partition shall set forth the rights and titles of all persons interested in the premises sought to be divided. Under this statute, it was said, in *Forder v. Davis*, 38 Mo. 107, as cited in *Freeman on Co-Ten.* (2d ed.), section 531: "The judgment of partition establishes the title to the land which is the subject of the partition, and, in an action of ejectment upon adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive at law upon all the parties to the record, and upon all persons holding under them afterwards. * * * * * The plaintiff might have asserted his adverse title in the partition suit, or pleaded it in bar, and, if decided against him, he had his remedy by appeal or writ of error. The judgment must be taken as conclusive here, that no such defense was made, or that, if made, it was decided against him. Not having asserted his claims there, they were wholly barred by law."

And Mr. Freeman very pertinently adds: "It is, perhaps, unfortunate that judges so often remark that

Finley v. Cathcart et al.

partition confers no new title, but only divides that which the parties previously possessed, because the remark justifies the inference that a judgment in partition has little or no effect upon the title. The truth is that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of anyone not actually or constructively a party to the suit; but it does operate by way of estoppel; it prevents any of the parties from relitigating any of the issues presented for decision, and the decision of which necessarily entered into the judgment; and it divests all titles held by any of the parties at the institution of the suit."

Appellant's title, at and long before the date of the partition suit, was the same as that now claimed by her. There was then an adjudication against her as to that title, and I think that she should now be estopped from making this collateral attack upon the judgment to which she was then a party.

MCCABE, J., concurs in the dissenting opinion.

ON PETITION FOR REHEARING.

PER CURIAM.—The appellee in this cause has filed what purports to be a petition for a rehearing. It wholly fails to respond to the requirements of rule thirty-seven of this court, for the reason that it is nothing more than a general statement to the effect that the judgment of the court on the former hearing was erroneous. In fact, the paper which is denominated a "petition" is but an extended argument wherein the appellee reiterates, and attempts more fully to support the reasons given in his original brief, in opposition to a reversal of the judgment of the lower court. A petition for a rehearing, in this court, is a pleading, and should not be an argument; and in order that it may conform to the rule of appellate practice,

The Cleveland, etc., R. W. Co. v. Miller, Admr.

as it seems to be settled by repeated adjudications of this court, it must state specifically the errors which the petitioner considers the court committed in the result reached in the former hearing, and general statements, or assertions, that the decision is erroneous, will not suffice. An applicant for a rehearing should include in his petition all the grounds upon which he bases his claim for a rehearing, and those not included therein, will be deemed by the court to have been waived, and will not be considered. The alleged petition herein, for the reasons which we have stated, does not comply with the rule as required, and consequently presents no question for review. It is therefore overruled.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. MILLER, ADMINISTRATOR.

[No. 17,577. Filed February 17, 1898.]

SPECIAL VERDICT.—*Failure to Find Fact in Favor of Party Having Burden of Proof.*—A failure to find a fact in favor of the party upon whom the burden of establishing it rests, is equivalent to an express finding against him as to that fact. *p. 498.*

NEGLIGENCE.—*Willfulness.*—*Contributory Negligence.*—In an action against a railroad company, based on a willful killing of plaintiff's intestate, it is not necessary to show by the averments of the complaint, nor by the evidence on the trial, nor the facts in the special verdict, a freedom from contributory negligence on the part of the deceased person at the time the injury was sustained. *pp. 498, 499.*

SAME.—*Willfulness.*—To constitute a willful injury, the act which produced it must have been intentional, or done under such circumstances that the effects which followed must reasonably have been anticipated as the natural and probable consequences thereof. *p. 499.*

RAILROADS.—*Injury at Crossing.*—*Willfulness.*—A railroad train going at the rate of thirty-five miles an hour approached the crossing of a public highway in the country, and when at a distance of about 1,200 feet therefrom a covered buggy in which a traveler was riding was discovered by the fireman, 150 feet from the crossing,

149 490
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152 394
152 548

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153 19

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154 100
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156 556

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149 490
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161 130
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166 13

149 490
169 333

The Cleveland, etc., R. W. Co. v. Miller, Admr.

moving towards it at a slow gait. The side curtains on the buggy prevented the traveler from seeing the train, and a strong wind was blowing in the direction thereof. The train continued its speed, and no danger signal or warning was given until the locomotive was within ninety feet of the crossing, when the fireman called to the engineer who applied the brakes and shut off the steam, but too late to prevent the killing of the traveler who had continued to approach the crossing, and was but four or five feet therefrom when the brakes were applied. *Held*, in an action against the railroad company, that the acts of the employes in charge of the locomotive were not such as would make the company liable for a willful killing. *pp.* 491-510.

RAILROADS.—*Presumption That Person Approaching Crossing Will Look and Listen.*—The employes in charge of a railroad train have a right to presume that a traveler on a public highway, who is approaching a crossing of the railroad, will not only listen, but that he will look in each direction for approaching trains. *p.* 504.

SAME.—*Special Verdict.*—*Incredible Finding.*—In an action against a railroad company for damages for injury willfully inflicted on plaintiff's intestate, a conclusion on the part of the jury that the fireman on the locomotive, when approaching a highway crossing, toward which a traveler was leisurely driving, actually knew what was in the mind of such traveler, and what he would do under the circumstances, cannot be accepted as credible. *pp.* 507, 508.

NEGLIGENCE.—*Willfulness.*—*Special Verdict.*—An action for a willful injury is not supported by a finding that the injury was the result of gross negligence. *pp.* 508-510.

From the Tippecanoe Circuit Court. *Reversed.*

C. B. Stuart, W. V. Stuart, E. P. Hammond, G. P. Haywood, J. T. Dye, B. K. Elliott and W. F. Elliott,
for appellant.

J. F. McHugh, A. L. Kumler and T. F. Gaylord,
for appellee.

JORDAN, J.—Appellee's intestate, Dr. Joseph H. Baker, of the age of thirty-nine years, on the 16th day of December, 1893, was killed as he was in the act of passing over appellant's railroad track at the crossing of a public highway in the country, in Tippecanoe county, Indiana, by reason of one of appellant's engines, to which a caboose was attached, colliding at

The Cleveland, etc., R. W. Co. v. Miller, Admr.

said crossing with the buggy in which Baker was riding. The complaint originally was in three paragraphs; the first proceeded upon the theory that the injury which caused the death of the deceased was willfully and purposely inflicted by appellant's servants in charge of said engine, it being alleged that said servants "willfully and purposely, and without any regard to the life or rights of said decedent, caused the said locomotive engine to run and strike upon and against said buggy in which the said Joseph H. Baker was then and there riding," etc. The second and third paragraphs were based upon the alleged negligent killing of Baker by appellant. A demurrer to each paragraph was overruled, and appellant answered by a general denial. After the introduction of the evidence, appellee dismissed the second and third paragraphs of his complaint, and the cause was submitted to the jury upon the cause of action set up in the first paragraph. The jury returned a special verdict, upon which both the appellant and appellee moved for judgment. The court denied the motion of the former and sustained that of the latter, and rendered judgment in his favor for five thousand dollars, being the amount of damages assessed by the jury in the special verdict.

The errors assigned in this court, are, in part, based upon the court's overruling the demurrer to the first paragraph of the complaint, and upon its sustaining the motion of the appellee for judgment on the verdict, and in denying that of appellant, and in overruling its motion for a new trial.

Assuming, without deciding, that the first paragraph of the complaint sufficiently charges a willful or intentional killing of the deceased by the servants of appellant, we pass to the consideration of the sufficiency of the facts embraced in the special verdict

to sustain the judgment under the issue raised by the first paragraph of the complaint.

The verdict, after stating facts to show that the plaintiff is the administrator of the estate of Joseph H. Baker, deceased, etc., and that the defendant is a corporation operating a railroad from the city of Indianapolis, Indiana, through the township of Wea, in Tippecanoe county, in said State, proceeds as follows: "that in said Wea township the railroad track of said defendant is crossed by a public highway, which is frequently traveled, known as the 'Stubtail Gravel;' that said highway runs in a northerly and southerly direction, and crosses said railroad track on the same grade; that said railroad track at said point runs in a northwesterly and southeasterly direction, and approaches and crosses said highway from the southeast at an angle of forty degrees; that from a point on said railroad track 2,265½ feet southeast of said highway crossing said railroad track is, for a distance of 1,391 feet towards said highway crossing on a descending grade of 25 1-3 feet per mile, and from there to said highway crossing is on an ascending grade of six feet per mile; that at a point 2,265½ feet southeast of said highway crossing, and extending thence in a southeasterly direction along the west side of said railroad track for a distance of 2,300 feet, there is a hedge fence 20 to 25 feet high; that at a point 482 feet southeast of said highway crossing, and from thence for a distance of 525½ feet, said railroad track is in a cut which is in some places six feet deep, but of an average depth of 3½ feet; that on the east side of said highway, and south of said railroad track, there is a barn and frame house; that the north line of said barn is 452 feet south of the place where said highway and railroad cross; that the north line of said frame house is 337 feet south of said crossing;

The Cleveland, etc., R. W. Co. v. Miller, Admr.

that said barn and house are, respectively, 18 and 48½ feet long from north to south; that the distance between said house and barn is about 67 feet; that said barn and house are respectively, 19½ and 17½ feet high, and are, respectively, 78 and 65 feet from said highway; that said railroad crossing and said surroundings are practically the same now as they were on the 16th day of December, 1893; that on the 16th day of December, 1893, Joseph H. Baker, the decedent, was riding along said highway in a buggy which made considerable noise, drawn by a horse driven by him, and as he approached said railroad crossing, and had reached a point on said highway between said barn and house, he leaned forward, listened, and looked eastward for the approach of a train towards said crossing from the southeast, and did not see nor hear any train approaching said crossing from the southeast; that the buggy in which the decedent was then riding was an ordinary top buggy, and had its side curtains on, and said decedent could not see in an easterly direction without leaning forward; that the horse drawing said buggy was gentle, and would not frighten at the approach of a railroad train; that said decedent did not look for nor learn of the approach of a train on said railroad track from the southeast until he had reached and entered upon said railroad track of the defendant; that as said decedent approached said railroad crossing in said buggy as aforesaid, the horse drawing the same proceeded in a slow trot until it had reached a point on said highway 150 feet south of said railroad crossing; that from said point on said highway 150 feet south of said crossing said horse drawing said buggy proceeded in a slow walk until it had entered upon the track of said defendant at said highway crossing; that as said decedent approached said crossing as aforesaid his view of a train approach-

ing said crossing from the southeast was obstructed by said hedge fence, said barn, and said house, and that said hedge fence, barn, and house were the only obstructions to decedent's view of an approaching train on said track from the southeast for a distance of more than one-half mile south of said crossing; that on the 16th day of December, 1893, at 12:50 o'clock p. m., a locomotive engine, with a caboose attached, left North Indianapolis, Indiana, in charge of the servants of the defendant, and proceeded towards said city of Lafayette; that said train was a non-scheduled or 'wild train,' and was not limited as to speed; that at or near Culvers, and about three miles southeast of said crossing, said train approached and passed three highway crossings running at the rate of sixty miles an hour, without the whistle or bell attached to said engine being sounded or rung; that said engine and caboose approached and passed a highway crossing about three-fourths of a mile southeast of the place where said railroad track crosses said highway known as the 'Stubtail Gravel' at a speed of fifty miles an hour without the whistle or bell attached to said engine being sounded or rung; that said engine and caboose approached and passed a highway crossing about 2,240 feet southeast of the place where said railroad track crosses said highway known as the 'Stubtail Gravel' without the whistle or bell attached to said engine being sounded or rung; *that the act of said defendant's servants in not sounding said whistle or ringing said bell, when approaching said crossings as aforesaid was done with a reckless disregard for the safety of persons traveling along said highways and a willingness to inflict injury* [our italics]; that on the 16th day of December, 1893, at about 3:50 o'clock p. m., of said day, said locomotive engine, with said caboose attached, ap-

The Cleveland, etc., R. W. Co. v. Miller, Admr.

proached from the southeast the place where said railroad track was crossed by said highway known as the 'Stubtail Gravel' at a high rate of speed, to wit, at least thirty-five miles per hour, and when said engine reached said crossing it struck, with great force and violence, the buggy in which said decedent was then and there as aforesaid, and said decedent was thereby thrown from said buggy on the ground, and was thereby so severely injured that he afterwards, on said day, died from his said injuries so received as aforesaid; that the servants of the defendant who were then and there in charge of said locomotive engine did not, as they approached said crossing, sound the whistle or ring the bell attached to said engine, nor give any signal whatever of the approach of said engine to said crossing; that when said engine was ninety feet from said crossing the engineer put on the air brakes with which said engine was equipped, shut off the steam, and reversed said engine; that the speed of said engine was thereby slackened, and said engine came to a stop one-quarter of a mile northwest of said crossing; that on the afternoon of said 16th day of December, 1893, the wind was blowing strongly from the west, and that when said engine was approaching said crossing as aforesaid the wind was blowing strongly from the west, and against said engine, and prevented a person traveling on said highway near said crossing in a buggy with the top up and side curtains on from hearing the approach of said engine to said crossing; that when said engine was between 1,200 and 1,300 feet from said crossing the fireman, who was on the left or south side of said engine, saw the horse and buggy in which the decedent then and there was on said highway approaching said railroad crossing; that when said fireman first saw said horse and buggy they were one hundred and fifty feet from said cross-

ing; that from the time said fireman first saw said horse and buggy as aforesaid he continuously observed the same until said buggy was struck by said engine as aforesaid; that when said fireman first saw said horse and buggy approaching said crossing said horse was moving in a slow walk, and continued so to move until said railroad crossing was reached as aforesaid; that when said engine was ninety feet from said crossing said fireman said 'Whoap! Whoap! Whoap!' to the engineer, and said engineer thereupon applied said air brakes, shut off the steam and reversed his engine as aforesaid, and at said time said decedent was within four or five feet of the south rail of said track; that said fireman knew as said engine approached said crossing that a person on said highway near said crossing could not, by reason of the velocity and direction of the wind, hear the noise of an approaching train; that said fireman knew, while said decedent was approaching said crossing, and was more than 100 feet south of said railroad that the decedent did not see or know that a train was approaching said crossing; that said fireman knew, when he saw said decedent approaching said crossing as aforesaid, that unless the whistle or bell on said engine was sounded or rung, or some warning given, said decedent would proceed toward and upon said crossing, and would be struck by said engine; that said fireman did not give, nor did he cause to be given, any signal by bell or whistle or otherwise, to said decedent of the approach of said train to said crossing; *that the act of said fireman in not giving or causing to be given any signal by bell or whistle or otherwise to said decedent as he approached said crossing, caused the death of said decedent as aforesaid, and was done by said servant with a reckless disregard for the*

The Cleveland, etc., R. W. Co. v. Miller, Admr.

safety of said decedent and a willingness to inflict an injury upon him." (Our italics.) The remainder of the verdict states facts appertaining to the question of damages, and the amount assessed by the jury, in the event that the law on the facts found be in favor of the plaintiff.

The burden on the issue joined between the parties to this action was cast upon the plaintiff below, appellee here. It has been affirmed and reaffirmed by the decisions of this court that the office of the special verdict is to find facts, and that no omission of a fact therein can be supplied by intendment. A failure to find a fact in favor of the party upon whom the burden of establishing it rests is equivalent to an express finding against him as to that fact. It is also a well settled rule of procedure that when a party who has the *onus* under the issues in the case demands a judgment in his favor on the facts stated in a special verdict, he is required to show by the material facts therein, which are within the issues, that he is entitled to a judgment; otherwise, he will fail in his demand. But where the moving party is not the one upon whom rests the burden of the issue, he may obtain a judgment in his favor with less difficulty, as it is a well recognized principle that the right of a party not having the burden to be awarded a judgment depends not alone upon the presence therein of material facts, but he may be entitled to it solely for the reason that there is an absence of some essential fact or facts which it was incumbent on his adversary to establish. *Rice v. City of Evansville*, 108 Ind. 7; *Trittipo v. Morgan*, 99 Ind. 269; Elliott's App. Proc., sections 753 and 754.

The appellee in this case, in order to prevail, if at all, must do so upon the cause of action alleged and set up in the first paragraph. The theory of the complaint, as constituted by this paragraph, as here-

tofore said, is that the appellant, by its servants in charge of the engine on the occasion and at the place in question, willfully or intentionally inflicted the injury which resulted in the death of appellee's decedent. The complaint being based on a willful killing of the deceased, it was not necessary to show by its averments, nor by the evidence on the trial, nor the facts in the special verdict, a freedom from contributory negligence on the part of the deceased person at the time the alleged injury was sustained. *Fisher v. Louisville, etc., R. W. Co.*, 146 Ind. 558.

The controlling question in the case does not depend on the negligence of either the appellant or appellee's intestate, and a recovery in favor of the appellee can only be sustained upon the ground that the injury which caused the death was willfully or intentionally inflicted, or that the act or conduct of the appellant from which in this case the fatal injury resulted was willful on its part, and of such a character, in the latter event, that the effects which followed must reasonably have been anticipated as the natural and probable consequences of said act or conduct. *Louisville, etc., R. W. Co. v. Bryan*, 107 Ind. 51; *Belt R. R., etc., Co. v. Mann*, 107 Ind. 89; *Louisville, etc., R. W. Co. v. Ader*, 110 Ind. 376; *Fisher v. Louisville, etc., R. W. Co.*, *supra*; *Conner v. Citizens' Street R. R. Co.*, 146 Ind. 430.

Mitchell, J., speaking as the organ of this court, in the Bryan case above cited, in reference to the rule applicable to a willful or intentional injury, said: "Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury. Or it must appear that the injurious act or omission was by design, and was such—considering

The Cleveland, etc., R. W. Co. v. Miller, Admr.

the place—as that its nature and probable consequence would be to produce serious hurt to some one. To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi criminal*.” (Our italics.)

In *Conner v. Citizens Street R. R. Co.*, *supra*, this court, after referring to cases in which contributory negligence on the part of the injured person was not a bar to a recovery, said: “The substance of the rule as established by the cases to which we have referred is, that to entitle one to recover for an injury without showing his own freedom from contributory fault, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation of those others.”

Our decisions recognize the doctrine, that where the act of the wrongdoer is so recklessly done, in disregard of the probable consequences, a willingness or intention to inflict the injury which results therefrom may be implied, and the distinction between an actual intention to do the injury, and a constructive one is shown. See *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250, and cases there cited; *Cincinnati, etc., R. R. Co. v. Cooper*, 120 Ind. 469.

In the appeal of *Parker v. Pennsylvania Co.*, 134 Ind. 673, the difference between willfulness and negligence as defined by the law is pointed out. It is there said: “Willfulness does not consist in negligence. On the contrary, as illustrated by the cases of Bryan and

Mann, heretofore cited, *the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness.*" (Our italics.)

Tested by the doctrine affirmed by the authorities to which we have referred (and others hereafter cited), which has been so uniformly asserted and adhered to by this court in its later decisions, the inquiry is: Do the facts embraced in the special verdict,—rejecting, as we must, conclusions and surmises of the jury, and facts of an evidentiary character,—when considered as an entirety, with all irresistible inferences that may result therefrom, entitle the appellee to a recovery for the willful or intentional wrong perpetrated by the appellant, as alleged in the complaint? We are of the opinion that the facts as found by the jury do not warrant a judgment in favor of the appellee on the issue tendered by his complaint. It may be conceded that the failure or omission of appellant's employes in charge of the engine upon the occasion in question to give the signals required by law when the engine was approaching the crossing of the public highway where the collision occurred was negligence *per se*; but, as heretofore mentioned, the question of negligence is not one with which we have to deal, and under the issues we cannot affirm a judgment based on the negligence of the defendant, although the same could be said to have been gross. The doctrine of comparative negligence does not obtain recognition in this State, and, where the negligence of the injured party contributes to the proximate cause of the injury, a comparison will not be made between the negligence of the person injured, and that of the party charged

The Cleveland, etc., R. W. Co. v. Miller, Admr.

with the wrong, in order to determine which was the greater, and award a recovery to the one guilty of the least. Negligence in a case, whether it be in a degree that may be termed slight, ordinary, or gross, is nevertheless negligence still; and when willfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence. Willfulness and negligence are the opposites of each other; the former signifying the presence of intention, and the latter its absence. *Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286; 4 Am. and Eng. Ency. of Law, pp. 80 and 81, and authorities there cited.

The liability of appellant, under the circumstances in this case, must be tested or measured by the acts or conduct of its employes in control of the engine after they became aware that the deceased was approaching the crossing where the collision occurred. *Terre Haute, etc., R. R. Co. v. Graham, supra*. But we may again affirm that the liability of the company, under the issues in the action, cannot be fixed or controlled by the negligence of its servants on the occasion in question. An examination of the facts stated in the verdict discloses that when the train was approaching the Stubtail Gravel crossing, at which the collision occurred, it was running at a speed of thirty-five miles per hour, and when at a point 1,200 or 1,300 feet from the crossing, the fireman, who was on the left or south side of the engine, first saw the buggy in which the deceased was riding on the highway; that at that time it was one hundred and fifty feet from the crossing, and the horse drawing the buggy was moving in a slow walk towards the crossing, which gait was continued until the latter was reached. It also appears that from the time the fireman first saw the horse and buggy he continuously observed the same until

the vehicle was struck by the engine. When the engine was ninety feet from the crossing, approaching the same, the fireman said or exclaimed to the engineer, "Whoap! Whoap! Whoap!" and the latter thereupon applied the air brakes, shut off the steam, and reversed the engine, and slacked its speed; and when this was done, the deceased was still on the highway, some four or five feet from the crossing. While it is true these efforts and acts of the engineer and fireman, when they discovered the danger to which the deceased had subjected himself in his attempt to go on to the track, did not prevent the fatal collision, nevertheless they show that when what may be said to have been the actual peril of the deceased, under the circumstances, was fully apparent, these servants invoked and used all the means at their command to avoid the injury. It must be remembered that when the fireman first saw the deceased he was on the highway, in his buggy, one hundred and fifty feet from the crossing, moving at a slow gait. He was not on the track, nor in any way at that time subjected to danger. The speed of the train had been reduced to thirty-five miles per hour when it approached this particular crossing. Certainly it cannot be asserted that this speed, under the circumstances, when approaching the crossing of a rural highway, outside of the limits of a town or city, as it was, was even an act of negligence, much less that it indicated on the part of those in control of the engine a willingness, either express or implied, to inflict an injury upon anyone. The crossing, in the main, seems to have been that of an ordinary highway. The conduct of the deceased, when first seen on the highway driving towards the crossing, was apparently that of an ordinary person. There is nothing to show that he was not endowed with and possessed at the time all the senses and faculties ordinarily possessed

The Cleveland, etc., R. W. Co. v. Miller, Admr.

by a human being. Appellant's servants had the right, under the circumstances, to presume that the deceased, before reaching the crossing, would exercise proper caution to prevent injury to himself; that he would not only listen, but also look in each direction for approaching trains, before attempting to cross the track, and, if he did so, he would see the train and be warned, and stop at the last moment, before entering on the track. If they acted on the presumption that the deceased would look out for his own safety, until it became too late, by the use of the means within their control, to avoid the collision, this would not establish that the injury was willfully inflicted. *Indianapolis, etc., R. R. Co. v. McClaren*, 62 Ind. 566; *Terre Haute, etc., R. R. Co. v. Graham*, *supra*; *Palmer v. Chicago, etc., R. R. Co.*, *supra*; *Pennsylvania Co. v. Meyers*, 136 Ind. 242. *

It was apparently but a moment before the collision that the deceased entered upon the track. It is true that he was seen approaching the crossing at a slow gait, but as we view the legitimate facts in the case, there is nothing that could have indicated to the fireman, to whom the willfulness to injure him is imputed, that he would not at least look, even if he could not hear the train by reason of the wind, and thereby be warned of the impending danger. There are no facts or inferences that may be deduced therefrom to show that the fireman or engineer, after becoming aware that the deceased was not going to stop before entering on the track, failed or omitted to exercise the proper degree of care by employing the means at hand to prevent the collision. The instant it appeared that he was not going to stop, all seems to have been done that could be, to prevent the engine from colliding with the buggy. In reason it cannot be claimed, under the circumstances, that appellee's decedent

could not have seen the train, had he looked in the direction from which it was approaching, in time to have stopped his horse before going upon the track. He was driving at a slow walk along a country road, and nothing is shown to rebut the contention of the appellant that he could have stopped his horse in a moment, without difficulty, and in a place of safety. For anything that appears, he might have done so at the last moment, when within five feet of the crossing with the engine ninety feet beyond. The fireman, under the circumstances, was not bound to presume that he did not see the train, but he had the right to rely on the assumption that he would look and see it, and that thereby he would be actuated by the natural prompting of self-preservation common to mankind in general, and stop before attempting to cross, and not subject himself to peril.

Where a person traveling on a highway, in his approach to a point where it crosses a railroad, can, by looking or listening, see or hear an approaching train in time to avoid injury, in the event he is injured, under such circumstances, by a collision, the law assumes that he neither looked nor listened, or, if he did either, that he did not heed what he saw or heard. *Smith v. Wabash R. R. Co.*, 141 Ind. 92, and authorities there cited.

While the rights of a traveler on a public highway to pass over a railroad crossing of such highway may be said, ordinarily, to be equal to that of the railroad company, nevertheless he is required to exercise due caution or care under the circumstances. He is bound to know that there may be peril in attempting to cross. The railroad track is itself an admonition of danger. He is bound to know that he must yield precedence to the trains of the company, and has no right even to expect that their speed will be slackened, much less to

The Cleveland, etc., R. W. Co. v. Miller, Admr.

assume that they will stop to permit him to pass. He is to assume that there is danger, and act upon such assumption with ordinary prudence and circumspection. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; Beach on Contributory Negligence, 191 and 198.

A standard author states the rule applicable to railroad crossings over rural highways as follows: "While unusual speed of railway trains does not of itself constitute negligence, yet it may be considered with other circumstances in determining the degree of care exercised. The law does not require the speed of trains to be slackened on approaching the crossing of a public highway in the country when a team is seen approaching it." 2 Wood's Railway Law, pp. 1330 and 1331.

It is true that the traveler has the right to presume that the company will discharge its statutory duty, and give the signals as required by the law; still this does not relieve him from using his own senses and exercising due care to avoid injury in crossing.

In the appeal of *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274, the court said: "But if an engineer see a team and carriage, or a man in the act of crossing the track, far enough ahead of him to have ample time, in the ordinary course of such movements, to get entirely out of the way before the approach of the engine; or if he sees a man walking along the track at a considerable distance ahead, and is not aware that he is *deaf* or *insane*, or from some other cause insensible of the danger; or if he sees a team or man approaching a crossing too near the train to get over in time, he has a right to rely upon the laws of nature and the ordinary course of things, and to presume that the man driving the team or walking upon the track, has the use of his senses, and will act upon the principles of common sense and the motive of self-preservation

The Cleveland, etc., R. W. Co. v. Miller, Admr.

common to mankind in general; and that they will, therefore, get out of the way."

In the opinion in the case of *Maryland, etc., R. R. Co. v. Neubeur*, 62 Md. 391, the rule is stated as follows: "But it was not the duty of those in charge of the train to anticipate the conduct of the plaintiff, and because they saw him approach the crossing to conclude that he would attempt to cross in advance of the train. On the contrary, they were, or would have been, fully justified in supposing he would not venture to cross until after the passage of the train. *Telfer v. North R. R. Co.*, 30 N. J. 188."

The principle asserted by these cases and other authorities to which reference has been made goes far to rebut the theory and contention of appellee's learned counsel that the killing of the deceased, under the facts and circumstances in this case, was willful or intentional.

Counsel for the appellee, however, place much stress on that part of the finding of the jury which is to the effect that the fireman on the train, when the deceased was at a point on the highway more than one hundred feet south of the crossing, knew that the latter did not see or know that a train was approaching the crossing, and that the fireman knew that, unless the bell was rung or the whistle sounded, or some warning given, that the deceased would go on to the crossing, and be struck by the engine. By this finding the legal presumptions in favor of the fireman are said to be of no avail in this case. In what manner, or by the means of what evidence, the jury could look back to the occasion in controversy, to the time when the engine, on which the fireman was riding, was some distance from the crossing, and the vehicle in which the deceased was driving leisurely along the highway was a hundred feet and over away from the

The Cleveland, etc., R. W. Co. v. Miller, Admr.

crossing, and determine and find as a fact that the fireman actually knew what was in the mind of the deceased at the time and place, and that the former actually knew that the latter did not see or hear the approaching train, and what he would do if the signals were not given, is a question which counsel for the appellee have not satisfactorily explained. It seems to us that there can be no reasonable theory upon which this finding, or, rather, conclusion, of the jury, can be explained, except that it is not the result of any legitimate evidence in the case,—but the offspring of the jury's own surmises or conjectures. That the fireman on this occasion actually knew what was in the mind of the deceased; a traveler on the highway some distance, at the time, from the public crossing, moving, as he was at a slow gait, and what he would do under the circumstances, does not accord with common, ordinary experience, and cannot be accepted as credible. *Lake Erie, etc., R. R. Co., v. Stick*, 143 Ind. 449.

Mere surmises, guesses, or conjectures of the jury can lend no support to their verdicts. In *Babcock v. Fitchburg R. R. Co.*, 140 N. Y. 308, it is said: "Verdicts must stand upon evidence and not upon mere conjecture, however plausible, and if the situation be such that the plaintiff cannot furnish the evidence the misfortune is his."

Appellee also insists, that the part of the verdict which immediately follows that portion which states what the fireman knew, what the deceased knew, and how he would act, lends much strength to their contention that at least the facts show that there was an implied intention on the fireman's part to willfully inflict the fatal injury. The clause in question is as follows: "That the act of said fireman in not giving or causing to be given any signal by bell or whistle, or

otherwise to said decedent as he approached said crossing *caused the death of said decedent as aforesaid, and was done by said servant with a reckless disregard for the safety of said decedent, and a willingness to inflict an injury upon him.*" (Our italics.) If this statement can in any manner be said to be a legitimate finding of facts, it contains two elements, one showing an omission by the fireman to give signals; the other (in italics) as mere evidentiary matters, or conclusions of the jury. Conclusions or evidentiary items have no appropriate places in a special verdict. By the first part of this statement the jury seemingly expose what they considered the true cause of the death of the deceased, namely, the failure or neglect of the fireman to give signals, and then proceed to conclude or state that this act of neglect "was done by said servant with a reckless disregard for the safety of said decedent," etc. Accepting the first part of this statement as a finding of fact, and it would seem to indicate that the theory upon which the jury proceeded is incompatible with the one on which the action is based under the complaint. The jury, by this finding, expressly attribute the death of the deceased to the negligent act of the fireman in omitting to give any signals, and, while this act of omission on the part of the employes in control of the engine may be said to be negligence *per se*, still it was but an act of nonfeasance, and not one of an aggressive character, and cannot establish the willful or intentional killing as alleged in the complaint. For, as heretofore asserted, when willfulness is the element in the act or conduct of the party charged, the case ceases to be one of negligence. There can be no middle ground between willfulness and negligence, for, as we have seen, the authorities affirm that each of these elements is the opposite of the other. Consequently,

The Cleveland, etc., R. W. Co. v. Miller, Admr.

when the facts in a given case show that the injury of which the plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered "gross negligence" can not support a charge that the injury was willfully or intentionally inflicted by the party accused. This rule seems to be firmly settled in this jurisdiction. *Terre Haute, etc., R. R. Co. v. Graham, supra*; *Pennsylvania Co. v. Smith*, 98 Ind. 42; *Ivens v. Cincinnati, etc., R. W. Co.*, 103 Ind. 27; *Louisville, etc., R. W. Co. v. Schmidt*, 106 Ind. 73; *Louisville, etc., R. W. Co. v. Bryan, supra*; *Brannen v. Kokomo, etc., Gravel Road Co.*, 115 Ind. 115.

We have given the argument and reasons of appellee's learned and able counsel, and the authorities which they have cited to sustain the judgment under the special verdict, full consideration, but, in our opinion, there can be no escape from the conclusion that the facts embraced in the verdict cannot sustain a recovery by the appellee under the issues tendered by his complaint. By dismissing the alleged cause of action based on the grounds of a negligent killing of his decedent, he would seem to have conceded that he could not recover on these grounds; possibly for the reason that absence of contributory negligence on the part of the deceased could not be shown.

It follows from the conclusion reached that the court erred in awarding a judgment on the special verdict in favor of the appellee.

The judgment is therefore reversed, and the cause remanded to the lower court, with instructions to overrule appellee's motion, and render judgment on the special verdict in favor of appellant.

Pomeroy et al. v. Beach et al.

POMEROY ET AL. v. BEACH ET AL.

[No. 18,326. Filed February 17, 1898.]

STATUTORY CONSTRUCTION.—Amendments.—An amendatory act and the amended statute are to be construed as one. *p. 513.*

GARNISHMENT.—Affidavit in Attachment.—Act of 1897 Construed.—

Construing the act of 1897 (Acts 1897, p. 233), with the code of civil procedure of 1881 concerning proceedings in attachment, it is evident that it was not the legislative intent that any one should be authorized to commence proceedings in garnishment, and obtain a summons without filing an affidavit in attachment, either at the time or before he filed his affidavit in garnishment. *pp. 513, 514.*

EXEMPTIONS.—Liberality of Construction.—Constitutional Law.—The constitutional provision relating to exemptions and the statutes passed pursuant thereto are based upon considerations of public policy and humanity and should be liberally construed. *p. 515.*

STATUTORY CONSTRUCTION.—Repeal of Statute by Implication.—The repeal of statutes by implication is not favored, and where there are two statutes upon the same subject they should be construed so that both will stand, if possible. *p. 516.*

EXEMPTIONS.—Act of 1897 Construed with General Exemption Law.—

Garnishment.—Construing the provision of the act of 1897 (Acts 1897, p. 233), that the wages of householders not exceeding \$25.00 shall be exempt from garnishment, with the general exemption law allowing to resident householders an exemption of \$600.00, the latter applies to resident householders and the former to householders who are not resident householders, but are householders in some other jurisdiction. *pp. 516, 517.*

SAME.—Garnishment.—Act of 1897 Construed.—The provision of the act of 1897 (Acts 1897, p. 234), that "no exemption shall be allowed against garnishment except as in this section provided" means that no exemption shall be allowed against garnishment to householders other than resident householders except as provided therein. *pp. 516, 517.*

SAME.—Constitutional Law.—A law allowing resident householders an exemption of \$600.00 and householders of another state an exemption of but \$25.00 is not unconstitutional as the legislature has the right to make such classification. *p. 517.*

From the Porter Superior Court. *Reversed.*

A. D. Bartholomew and William Johnston, for appellants.

John E. Cass, for appellees.

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Pomeroy et al. v. Beach et al.

MONKS, J.—This action was brought against appellants by the appellees, and an affidavit in garnishment was filed under the provisions of the act of 1897 (Acts 1897, p. 233). There was a special finding of the facts and the conclusions of law stated thereon, in which the court held, in substance, that under the provisions of said act of 1897 only \$25.00 of the wages of appellant Pomeroy, a resident householder, was exempt from seizure for the payment of said indebtedness, and rendered judgment accordingly.

Appellants contend, among other things, that said act of 1897 is in conflict with the provisions of our constitution, and is, therefore, void. This act was passed to amend sections 208, 216, 221, 224, and 243 of the act concerning proceedings in civil causes, approved April 7, 1881, being sections 943, 948, 951, 954, 971, Burns' R. S. 1894 (931, 936, 939, 942, 959, R. S. 1881). The sections amended are concerning proceedings in garnishment.

Before said amendment of 1897, it was provided that the process against a garnishee could only issue upon filing the proper affidavit at the time, or before or after the order of attachment issued. Section 943, Burns' R. S. 1894 (931, R. S. 1881). But no process could issue against a garnishee unless an affidavit in attachment had been filed, or the affidavit in garnishment contained also all the essential requirements of an affidavit in attachment.

The sections of the Code of Civil Procedure of 1881 concerning proceedings in attachment and garnishment are in one act, and are to be construed together. They provided for both remedies, but no judgment could be recovered against the garnishee unless a writ of attachment had been issued, and a judgment was recovered against the defendant in the attachment proceedings. *Emery v. Royal*, 117 Ind. 299, 303-

304; 2 Shinn on Attachment and Garnishment, section 694.

It is provided in section 216 of the Code of Civil Procedure, as amended by the act of 1897, Acts 1897, p. 233, being section 943, Burns' Supplement, 1897 (931, Horner's R. S. 1897), that "in all personal actions arising upon contract, express or implied, or upon a judgment or decree of court, if at the time such action is commenced or at any time afterwards, whether a writ of attachment has been issued or not," the plaintiff file the proper affidavit and undertaking, a garnishee summons shall be issued. It will be observed that the section as amended, like the original section, provides that the garnishee process may issue, whether a writ of attachment has been issued or not, but the affidavit in attachment is not waived or dispensed with.

The sections, as amended by said act of 1897, are to be read into the Code of Civil Procedure in the place of the original sections, and from the date said act took effect are a part of said Code of Civil Procedure, and must be so construed. An amendatory act and the amended statute are to be construed as one. *Walsh, Treas., v. State, ex rel.*, 142 Ind. 357, 362, and cases cited; Sutherland on Stat. Const., section 288.

It is clear, therefore, that the act of 1897 does not provide an independent procedure in garnishment, but that the amended sections are to be construed with the sections of the Code of Civil Procedure of 1881 concerning proceedings in attachment and garnishment not amended by said act. When so construed, it is evident that it was not the legislative intent that any one should be authorized to commence proceedings in garnishment, and obtain a summons, without also filing an affidavit in attachment, either

Pomeroy et al. v. Beach et al.

at the time, or before he filed his affidavit in garnishment. Now, as before the act of 1897 was passed, an affidavit in attachment must be filed, as well as an affidavit in garnishment, before the garnishee summons can issue.

It is true that section 943 (931), *supra*, as amended, provides for a garnishee undertaking, but, as the amendment of 1897 makes provision for garnishee summons without a writ of attachment being issued, and that a judgment may be recovered against the garnishee where no writ of attachment has been issued, it must be held that such undertaking is only necessary when no bond in attachment has been filed, and when such attachment bond has been filed no undertaking in garnishment need be filed. It certainly was not the purpose of the legislature to require an affidavit, as provided by section 928, Burns' R. S. 1894 (916, Horner's R. S. 1897), in which among other things some one or more of the grounds of attachment provided in section 925, Burns' R. S. 1894 (913, Horner's R. S. 1897) must be set forth, before an order for attachment could be issued, and proof of such facts before a plaintiff would be entitled to a judgment in attachment, but to authorize a garnishee summons and a judgment against a garnishee without any affidavit or proof of such facts merely upon affidavit containing the facts required by section 943 (931), *supra*, and the proof thereof at the trial.

The facts stated in the special finding do not show the existence of any one or more of the grounds of attachment set forth in section 925 (913), *supra*. Unless such facts were shown by the special finding, appellees were not entitled to judgment against the garnishee.

Under the provisions of section 715, 730, Burns' R. S. 1894 (703, 718, Horner's R. S. 1897), a resident house-

holder was entitled to an exemption of \$600.00 in any kind of property he might designate, and could take the whole amount, or any part thereof, in wages due him, if he should so elect. Unless the said act of 1897 changed said law in regard to the debtor's right to an exemption, the trial court erred in its conclusions of law.

Section twenty-two of article one of the constitution imposes upon the legislature the duty to pass laws exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability. The exemption laws of the State in force when the act of 1897 was passed were enacted in compliance with this provision of the constitution.

It has been uniformly held in this State that the constitutional provision relating to exemptions, and the statutes passed pursuant to the requirements thereof, were based upon considerations of public policy and humanity; and it was not alone for the benefit of the debtor, but for his family also, that such laws were enacted, and the same should be liberally construed. *Kelley v. McFadden*, 80 Ind. 536, 538; *Astley v. Capron*, 89 Ind. 167, 170; *Butner v. Bowser*, 104 Ind. 255; *Junker v. Hustes*, 113 Ind. 524; *Chatten v. Snider*, 126 Ind. 387, 389, 390, and cases cited; *Citizens State Bank, etc., v. Harris*, ante, 208; 7 Am. and Eng. Ency. of Law, 130 and 131.

In *Chatten v. Snider*, *supra*, this court said: "It is well settled that exemption laws are to be liberally construed, with the view to favoring the judgment debtor, and the exemption is not alone for the benefit of the debtor, but for his family as well, and that such construction should be given thereto as will save the debtor and his family at all times the full exemption which the law bestows."

If the act of 1897 deprives a resident householder of

Pomeroy et al. v. Beach et al.

his right to take his wages in excess of \$25.00 as exempt from seizure for the payment of his debts, growing out of or founded upon a contract, express or implied, in proceedings of garnishment, it is because said act of 1897 repeals by implication so much of the exemption law as allows a resident householder that right.

The repeal of statutes by implication is not favored, and when there are two or more statutes upon the same subject they should be construed so that both will stand, if possible. *Wright v. Board, etc.*, 82 Ind. 335, 337; *City of Madison v. Smith*, 83 Ind. 502, 511; 23 Am. and Eng. Ency. of Law, pp. 489, 492; Black on Interpretation of Stat. 112.

Applying the rule that exemption statutes are to be liberally construed in favor of the debtor, and that repeals by implication are not favored, it is clear that the act of 1897 did not deprive the appellant Pomeroy, a resident householder, of his right to select his wages up to \$600.00 as exempt.

It will be observed that the act of 1897 provides that the wages of householders, not exceeding \$25.00, shall be exempt, and that his wages in excess of \$25.00 shall not be exempt, while the general exemption law allows \$600.00 to resident householders only. Construing these statutes together, one applies to resident householders and the other, the act of 1897, to householders who are not resident householders, but are householders in some other jurisdiction. It is true that it is provided in said section 243, as amended, Acts 1897, p. 234, being section 971, Burns' Supplement 1897 (959, Horner's R. S. 1897), that "no exemption shall be allowed as against garnishment except as in this section provided," but this only means that no exemption shall be allowed as against garnishment to the class of householders named in said

section,—that is, householders other than resident householders,—except as provided in said section. So construed, the act of 1897 provides that no exemption of wages in excess of \$25.00 shall be allowed a householder of another state as against garnishment, and this in no way deprives a resident householder of his right to take his wages as exempt, even if they amount to \$600.00. The fact that said section 243, Acts 1897, p. 234, only allows the householder of another state wages as exempt, and limits the amount to \$25.00, while the resident householder is allowed an exemption of \$600.00 and may take a part or all of his exemption in wages or other property, does not render said section, or the act of 1897, unconstitutional. Certainly, this is a classification which the legislature has the right to make. Cooley on Const. Lim. (6th ed.) 490.

Said act is constitutional. It therefore follows that the court erred in its fourth and fifth conclusions of law. The judgment is reversed; with instructions to restate the fourth and fifth conclusions of law in accordance with this opinion, and to render final judgment in favor of appellants on the affidavit in garnishment.

DISSENTING OPINION.

HACKNEY, J.—I am not prepared to concur in the construction of the amendatory act of 1897 which my associate declares. On the contrary, in my opinion, it was the intention of the amendatory act to eliminate from the amended sections the necessity, in sustaining garnishment, that some ground of attachment be alleged and established. In this view of the amendatory act, the constitutional validity of that act would arise, but, since this view is not adopted by a majority of the court, it is proper that the constitutional questions should not be passed upon.

The Chicago, etc., R. R. Co. v. The City of Huntington.

THE CHICAGO AND ERIE RAILROAD COMPANY v.
THE CITY OF HUNTINGTON.

[No. 18,393. Filed February 17, 1898.]

SEWERS.—*Appeals to Circuit Court from Assessments Prior to the Issuing of a Precept.*—The provision for appeals to the circuit court from the issuing of a precept against a property owner for the collection of a sewer assessment, made by section 4298, Burns' R. S. 1894, applies where the contractor has been paid, and the city is substituted to his rights the same as in case the contractor himself applies for a precept, and an appeal taken from such assessment prior to the issuing of a precept is premature.

From the Huntington Circuit Court. *Affirmed.*

W. O. Johnson, O. W. Whitelock and S. E. Cook,
for appellant.

J. Fred France and Z. T. Dungan, for appellee.

HOWARD, C. J.—This was an appeal to the court below from assessments for the construction of a public sewer, made by the common council of the appellee city against certain lots and lands of the appellant. The appeal was dismissed, and judgment entered against appellant for costs. It is contended that the appeal was premature, being taken from the assessments made by the city council, whereas the only appeal provided for in the Barrett law is one to be taken on the issue of a precept for collection of assessments.

The proceedings for the construction of the sewer and the making of the assessments are set out in the record, and seem to be in substantial compliance with the statutes providing therefor. The council found the sewer to be a general one, and the assessments were made as provided for in the act approved March 4, 1893 (Acts 1893, p. 332, sections 4273-4275, Burns' R. S. 1894).

In *Alley v. City of Lebanon*, 146 Ind. 125, it was held

The Chicago, etc., R. R. Co. v. The City of Huntington.

that, in the enactment of this statute, "the legislature intended only to provide a method by which the common council or town board should be guided in making assessments upon the property benefited by the work." The statute is supplementary to, and to be construed in connection with, the general law for the construction of sewers. It was also held in the case last cited that the reference in the statutes to the acts "relating to the assessments of benefits in the laying out of streets" concerned only the method of assessment by the town board or common council; that is, that for a local sewer, or its equivalent, the assessment is to be per front foot on the abutting property, and for the excess, in a general sewer, "the actual benefits and damages, and not merely the frontage, area, or value of property, are to be considered." It is not even necessary to refer the matter to the city commissioners. The assessment, "in every case is to be made by the town board or common council."

In this case, however, the city authorities, following what they deemed to be the spirit of the law, did refer the matter of the assessment to the city commissioners. No error resulted from this. The work of the commissioners took the place of a report by the city engineer. The council, in confirming and adopting the report of the commissioners, itself made the assessment. The report of the engineer, or, as in this case, of the commissioners, is for the information of the common council. The council may change or correct such report as it may deem right and just, and it is the final act of the council that constitutes the assessment. The work of the commissioners in this case was, therefore, no essential part of the proceedings; nor is there anything in the statutes relating to the city commissioners that enters into the statute here under consideration save only the requirement that

The Chicago, etc., R. R. Co. v. The City of Huntington.

the town board or common council, in making the assessment for the construction of so much of a general sewer as is over and above the equivalent of a sufficient local sewer, should consider only the benefits to the property to be affected. The appeal provided for in case of "the assessments of benefits in the laying out of streets," has, consequently, no application to such a case as this.

But appellant further contends that, as the only provision for appeal in the Barrett law is that given in favor of a property owner when the contractor sues out a precept in case of nonpayment of an assessment, and as the city has paid the contractor in this case, and the assessments are all due the city, no appeal can be taken by this appellant, unless it can be taken in the manner pursued in the appeal before us. Even if this were true it would not follow that the law is invalid. The legislature need not provide for appeal, but might make the action of the council final. *Hughes v. Parker*, 148 Ind. 692.

We think, however, that the provision for appeal given in section 10 of the laws as amended, Acts 1891, p. 326 (section 4298, Burns' R. S. 1894), applies where the contractor has been paid, and the city is substituted to his rights, quite the same as in case the contractor himself applies for a precept. What was said in *City of Elkhart v. Wickwire*, 121 Ind. 331, is in point, as we think, as to such a case: "If necessary the law will treat the city as an equitable assignee of the assessments, and allow the precepts to issue in the names of the contractors for the use of the city. But we are unable to see any good reason why the assessments might not be made for the benefit of the city, and precepts issued in its name; the payment by the city did not discharge the assessments as against the property-holders, and as the money is due to the city we can

Jamison, by Next Friend, v. Lake Erie, etc., R. R. Co.

see no good reason why the precepts might not thus issue."

The city's rights after payment of the contractor are not less than those of the contractor, and the affidavit of the mayor, or other official to be designated by the common council, might be substituted for that of the contractor. As, therefore, the city may have a precept for the collection of a delinquent assessment due to it, the right of appellant to an appeal is in no way abridged.

The act of 1893, providing for the manner of making assessments for sewers is, therefore, a valid and constitutional part of the general law for the construction of sewers, and appellant's appeal, having been premature, was properly dismissed.

Judgment affirmed.

JAMISON, BY NEXT FRIEND, v. LAKE ERIE AND
WESTERN RAILROAD COMPANY.

[No. 18,100. Filed Nov. 4, 1897. Rehearing denied Feb. 17, 1898.]

JUDGMENT.—*Action to Review.*—*Complaint.*—A complaint in an action to review a judgment must contain in the body thereof enough of the pleadings in the cause sought to be reviewed, or the substance, nature or character thereof, to present the question of the alleged error without resorting to the transcript of the record thereof filed with the complaint as an exhibit.

From the Morgan Circuit Court. *Affirmed.*

W. R. Harrison and W. J. Beckett, for appellant.

W. H. H. Miller, J. B. Elam and John B. Cockrum,
for appellee.

MONKS, J.—This action was brought by appellant to review a judgment obtained by appellee against appellant. Appellee's demurrer to the complaint, for want of facts, was sustained, and, appellant refusing to plead further, judgment was rendered against ap-

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Jamison, by Next Friend, v. Lake Erie, etc., R. R. Co.

pellant. The only error assigned calls in question the action of the court in sustaining the demurrer to the complaint. Appellee insists that under the provisions of section 365, Burns' R. S. 1894 (362, R. S. 1881), it is only when a pleading is founded upon a written instrument or account that the same can be made a part of the pleading by filing the original, or a copy, with such pleading; that an action to review a judgment is not brought upon such judgment, or to recover thereon, but to review the same for error; and that, therefore, the part of the record sought to be reviewed cannot be made a part of the complaint by filing the same therewith as an exhibit; that, as the part of the record sought to be reviewed was not set forth in the complaint, but was only filed therewith as an exhibit, the court did not err in sustaining the demurrer thereto.

We need not, and do not, however, determine whether or not it is necessary, as insisted by appellee, to set forth in a complaint for review a copy of the part of the record sought to be reviewed, for the reason that, conceding that it is not necessary, and that a copy of the same may be filed with the complaint as an exhibit, the complaint in this case was not, for other reasons urged by appellee, sufficient to withstand the demurrer for want of facts.

It is averred in the complaint that appellant filed a complaint in two paragraphs to recover damages for personal injuries inflicted by appellee upon appellant, and that the first paragraph charged that the injury was caused by appellee, whether willfully or negligently is not stated, and the second paragraph that said injury was willfully and intentionally inflicted upon appellant by appellee; that an answer in two paragraphs was filed, to the second of which appellant demurred for want of facts, which demurrer

Jamison, by Next Friend, v. Lake Erie, etc., R. R. Co.

was overruled, and to which ruling the appellant excepted. That the cause was tried by a jury, and at the close of the evidence the court directed a verdict for the appellee, and judgment was rendered on the verdict in favor of appellee. It is alleged as error that the court erred in overruling the demurrer to the second paragraph of answer. Even if it is sufficient to file a copy of the record sought to be reviewed as an exhibit, it would seem, under our practice, that the facts stated in a complaint for review for error of law, should be sufficient to withstand a demurrer without resorting to the transcript filed therewith. In actions brought for a new trial on account of newly discovered evidence, the rule is that the pleading and evidence in the original case, and the newly discovered evidence may be filed with the complaint as an exhibit. Yet, in such cases, in determining the sufficiency of the complaint the pleadings and evidence in the original case filed with the complaint as an exhibit cannot be considered. Neither the pleadings nor evidence in the original case can be resorted to for the purpose of supplying any averment essential to the sufficiency of the complaint. All the averments essential to the validity of the complaint must be set out in the body of such complaint, or the same will not be sufficient to withstand a demurrer for want of facts. The character of the action, and the materiality of the newly discovered evidence, must be shown by the facts set forth in the body of the complaint, and not left to be inferred from the pleadings and evidence in the original case filed therewith. *Davis v. Davis*, 145 Ind. 4, and cases cited. This doctrine was applied to a complaint to review a judgment on account of newly discovered matter in *Hill v. Roach*, 72 Ind. 57, where it was held that the newly discovered matter must be set out in the body of the complaint, and the affidavits

The Baltimore, etc., R. W. Co. v. Conoyer.

filed with such complaint, setting up said matter, could not be resorted to in determining the sufficiency of the complaint.

So, in this case, we think the complaint should have stated so much of the complaint and answer, or the substance or nature or character thereof, as was necessary to present the question of the alleged error, without resorting to the exhibit filed with the complaint. It was necessary to set out so much of said second paragraph of answer, or the substance, nature, or character thereof, as would show whether or not the same was a defense to both paragraphs of complaint to which it was addressed. No part of this second paragraph of answer, or the substance or nature or character thereof, was set forth in the complaint for review, and the court did not err, therefore, in sustaining the demurrer thereto.

Judgment affirmed.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. CONOYER.

[No. 18,182. Filed Nov. 23, 1897. Rehearing denied Feb. 18, 1898.]

RAILROADS.—Failure to Give Statutory Signals at Crossings.—Negligence.—The failure of a railroad company to discharge its duty in regard to giving the signals at public crossings, as enjoined upon it by statute, is negligence *per se*; but to entitle an injured party to recover he must go further and show that such negligence was the proximate cause of the injury, and that he himself was not guilty of contributory negligence. p. 526.

PRACTICE.—Motion to Direct Verdict.—Evidence.—Appeal.—If a defendant in an action, upon the close of plaintiff's evidence in chief, moves the court to direct a verdict on such evidence in his favor, he must stand upon his motion; if he subsequently introduces his own evidence, he will be regarded as having waived or receded from his motion, and therefore no question can be considered on such motion on appeal. p. 527.

INSTRUCTIONS.—Remedy When Not Sufficiently Specific.—Where an

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The Baltimore. etc., R. W. Co. v. Conoyer.

instruction is not sufficiently specific, it is the duty of the aggrieved party to tender a proper instruction and request that the same be given. *p. 528.*

RAILROADS.—*A Person Approaching Crossing May Presume that Statutory Signals will be Given.*—A person approaching a railroad crossing has a right to assume that the company will obey the law, by giving the required signals of an approaching train; and if such person, after having exercised due care, and employed his senses of seeing and hearing, can neither see nor hear an approaching train, he is justified in presuming that he can pass over in safety. *pp. 528, 529.*

INSTRUCTION.—*When Party Estopped from Objecting to an Irrelevant Instruction.*—Where a party asks and the court gives an irrelevant instruction, he is estopped from objecting to an amendment by the court of another instruction tendered by him, which amendment does nothing more than to add to the objectionable charge requested in the first instance. *pp. 529, 530.*

SAME.—*Refusal to Give.—Defective Record.*—The refusal to give requested instructions is not available error where the record does not affirmatively show that the instructions purporting to have been given by the court were all the instructions given in the cause. *p. 531.*

APPEAL.—*Petition for Rehearing.—Sufficiency Of.*—A petition for a rehearing is a pleading, and not a mere argument or brief, and where a purported petition for a rehearing does not state any specific cause or causes for which the judgment of the Supreme Court is supposed to be erroneous, it presents no question for consideration. *p. 532.*

From the Pike Circuit Court. *Affirmed.*

W. H. DeWolf, Gardiner & Gardiner and E. W. Strong, for appellant.

J. S. Pritchett, Cullop & Kessinger, Posey & Chappell and Townsend & Wilhelm, for appellee.

JORDAN, J.—The appellee recovered damages against appellant for injuries sustained by reason of one of its passenger trains colliding with him as he was passing over the company's track, in a wagon, at a point where it intersects a public highway near the city of Vincennes. On change of venue, the case was tried in the Pike Circuit Court, and, over appellant's motion for a new trial, a judgment was rendered in

The Baltimore, etc., R. W. Co. v. Conoyer.

favor of appellee for the damages awarded by the jury.

The cause of action in controversy is based upon the alleged negligence of the appellant in omitting to give the statutory signals when the train which ran over the appellee was approaching the public crossing in controversy. It is insisted that the amended complaint does not sufficiently state a cause of action, inasmuch as it fails to show that the negligence of the appellant was the proximate cause of the injury of which appellee complains, and that it does not establish the fact that there was, at the time of the accident in question, an absence of contributory negligence on the part of the latter. That an action ordinarily accrues in favor of a person, not guilty of contributory negligence, who is injured by the negligence of a railroad company in failing to give signals, as required by the statutes of this State, when its train is approaching the crossing of a public highway, is settled by numerous decisions of this court. And, as a general proposition, the failure of a railroad company to discharge its duty in regard to giving the signals at public crossings, as enjoined upon it by the statute, is negligence *per se*. Still this alone is not sufficient to entitle the injured party to a recovery, but he must go further, and show that such negligence was the proximate cause, without which the injury of which he complains would not have resulted, and that he himself was not guilty of negligence contributing to such injury. See *Baltimore, etc., R. W. Co. v. Young*, 146 Ind. 374, and authorities cited; *Chicago, etc., R. R. Co. v. Thomas*, 147 Ind. 35.

An examination of the pleading in question satisfies us that the facts therein averred affirmatively establish that the accident, occurring at the crossing, and to which the plaintiff attributed his injury, was

due to the negligence of the defendant, in omitting to give the required signals; and that it is further shown by both the specific facts averred therein, as well as the general allegations, that the plaintiff was free from fault, and did not contribute to his alleged injury; and, tested by the rule to which we have referred, the complaint is sufficient.

At the close of the appellee's evidence in chief, appellant moved the court to direct the jury to return a verdict in its favor. The motion was overruled, and the appellant excepted. The trial then proceeded, and appellant introduced its evidence, and the evidence was finally closed by both parties, without appellant renewing or offering to renew the motion in question. The action of the court in denying this motion is urged as error, and we are asked to review the plaintiff's evidence in chief, separate and apart from that given by the appellant in chief and the appellee in rebuttal, and thereby determine the alleged error. This, under the circumstances, we are not authorized to do. If a defendant in an action, upon the close of the plaintiff's evidence in chief, moves the court to direct a verdict on such evidence in his favor, he must stand by his motion; for, if he subsequently introduces his own evidence, he will be regarded as having waived or receded from his motion, and therefore no question can be considered under such motion on appeal. The appellant might have renewed its motion, had it desired, at the close of all of the evidence in the case, and requested the court, in consideration of the entire evidence, to direct a verdict in its favor, and, in that event the judgment of the court would have rested on the evidence as a whole, and not upon a part thereof. This, we think, is the correct rule, and is recognized as such by the authorities. Elliott App. Proc., section 687, and authorities there cited; *Citizens Street R. R. Co. v. Stoddard*, 10 Ind. App. 278.

The Baltimore, etc., R. W. Co. v. Conoyer.

It is next insisted that the court erred in giving certain instructions to the jury. Instructions numbered one, given at the appellee's request, is criticised for being too general, and misleading. The argument of the learned counsel for appellant, however, does not convince us that the instruction in controversy is open to these objections. It is, in its character, but an exposition in general in regard to the duties of the servants of a railroad company, in charge of its trains, when approaching a public crossing, and, likewise, of a person upon a highway in approaching and in going upon and over such crossing. It substantially and correctly stated the law in this respect in a general way; and, if not sufficiently specific, the proper thing for appellant to have done was to have tendered one of that character to the court with the request that it be given. When the instruction is considered in connection with the entire charge, as it must be, it cannot be said to have tended to mislead the jury. Counsel, continuing their criticism of the instruction, say: "We are unable to find any cases holding that a person about to cross a railroad track has a right to presume that a train is not within eighty rods, merely because he failed to hear the whistle sounded or the bell rung." It is true, as a legal proposition, that the mere omission of signals, or the like, cannot alone, ordinarily, be accepted by a person about to pass over a crossing as an assurance that there is no danger in crossing. But the instruction in dispute does not state that the failure alone to hear the whistle sounded or the bell rung would warrant a presumption upon the part of the traveler that there is no approaching train within eighty rods of the crossing. Counsel seem to ignore the fact that the charge included, not only the sense of hearing, but that of sight as well, and, substantially and in effect, advised the jury that a person approach-

ing a railroad crossing has the right to assume that the company will obey the law, by giving the required signals of an approaching train; and if such person, under the circumstances, after having exercised due care, and employed his senses of seeing and hearing, to ascertain if a train is approaching, and thereby avoid danger, can neither see nor hear an advancing or moving train, he is justified in presuming that he can pass over the crossing in safety. This brought the instruction well within the rule asserted by the authorities. See *Pittsburg, etc., R. W. Co. v. Martin*, 82 Ind. 476; *Miller v. Terre Haute, etc., R. W. Co.*, 144 Ind. 323; Elliott on Railroads, section 1158.

Appellant requested the court to give the following instruction: "If a train of cars hauled by a locomotive engine upon a railroad, and a citizen traveling in a wagon upon a public highway, are both approaching a crossing of such highway with such railroad, under circumstances indicating that a collision between them is likely to occur, if they both proceed on their way without stopping, the engineer in charge of such train, if he has sounded the required signals with the engine whistle, and is ringing the bell of the engine, has a right to presume that the citizen will stop before he drives upon the crossing, and has a right to proceed on his way with his engine and train until he discovers that the citizen does not stop; and if under such circumstances, he discovers that the citizen does not stop, when it is too late to stop his train in time to avoid the collision, and for that reason a collision occurs, and injury results therefrom, the railroad company would not be liable therefor." This the court gave with the following amendment: "But if the engineer makes the discovery, before it is too late, that the citizen does not stop, and if, after making such

The Baltimore, etc., R. W. Co. v. Conoyer.

discovery, the engineer could have stopped his train, and did not, then, in that view of the case, the railroad company would be liable for the injury inflicted upon the citizen by such collision." It is insisted that the instruction as requested correctly stated the law applicable to the case as presented by the evidence; but the court's modification thereof, by adding thereto the part above set out, destroyed its applicability, and injected into the cause a new issue, inasmuch as the plaintiff's case is based wholly upon the omission of appellant to give the required signals when its train was approaching the public crossing, and that there was no claim under the evidence that the engineer could have stopped in time, after seeing the plaintiff, to have avoided the accident. These objections with equal propriety, could be made to the instructions as requested to be given in the first instance. The evident purpose or theory of the instructions asked for by the appellant was to inform the jury as to what the general legal rule was, in the opinion of the trial court, when a train of cars and a person in a wagon were both approaching a public crossing, under circumstances indicating that a collision would result. The addition made to the instruction simply served to amplify the rule which appellant asked to have the court declare to the jury. Inasmuch as the appellant invited the court to give an instruction, in the first instance, which, when tested by its own objections made to the amendment, ought not to have been given, it is not in a position to complain of the court's action in making the amendment and giving the instruction as amended, which could do nothing more, under appellant's contention, than to add to the objectionable charge which it had requested. See Elliott's App. Proc., sections 626, 627. Upon any view of the question, it is not in a position to complain of the modification made by the court.

Appellant also requested the court to give a series of other instructions to the jury. Some of these were given and others were refused. The ruling of the court in its refusal to give these instructions is not specially criticised, except as to number three. Counsel for the appellee, however, confront us with their contention that we cannot consider any question growing out of the court's refusal to give the instructions in controversy, for the reason that the record does not affirmatively show that those given were all that were given in the cause. An examination of the record verifies this contention. Appellee's counsel say: "For aught that appears, the court may have given instructions concerning the same questions involved in those refused." The rule for which they contend in this respect is one firmly settled by our decisions. *Musgrave v. State*, 133 Ind. 297, and authorities there cited; *Wilson v. Johnson*, 145 Ind. 40; *New York, etc., R. R. Co. v. Hamlet Hay Co.*, ante, 344.

Without, however, departing from the rule in question, to which we still adhere, we have, as a matter of grace to appellant, and not as a right, examined instruction three, refused, and find that the general principles of law therein stated are the same as those upon which the jury had been fully informed by the court in other instructions, and, consequently, under the circumstances, no harm can be said to have resulted to appellant from the court's refusal to give this charge. In fact, it may be said, we think, that the learned trial judge fully advised the jury upon all matters of law relative to the cause, and that the charge as a whole was as favorable to appellant as it could legitimately have requested.

The evidence is conflicting; yet there is evidence which fully sustains the judgment of the lower court, and therefore, under a well settled and controlling

Shepard, Trustee, v. The Meridian National Bank *et al.*

rule, we cannot disturb the decision of the lower court upon the evidence. Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Appellant has filed what purports to be a petition for a rehearing. It presents no question, however, for the consideration of this court, for the reason that it does not state any specific cause or causes for which the judgment of affirmance is supposed to be erroneous, and therefore does not conform to rule thirty-seven of this court. A petition for a rehearing, under the rules of appellate procedure, is a pleading, and not a mere argument or brief, as is the paper in this case which is denominated a petition. This court has recently had occasion to state and point out what was essentially required in order to constitute a sufficient petition for a rehearing. See *Reed v. Kalfsbeck*, 147 Ind. 148; *Finley v. Cathcart*, ante, 470. For the reasons stated the petition is ordered to be overruled.

SHEPARD, TRUSTEE, v. THE MERIDIAN NATIONAL
BANK ET AL.

[No. 17,788. Filed Nov. 28, 1897. Rehearing denied Feb. 18, 1898.]

APPEAL AND ERROR.—*Record.*—*Motions.*—No question is presented on appeal as to the ruling of the court on a motion made by defendant to require plaintiff to elect whether he would sue as trustee or receiver, where such motion was not brought into the record by bill of exceptions or by order of court. *p. 538.*

PRACTICE.—*Harmless Error.*—An order of court requiring a plaintiff to elect whether he would sue as trustee or receiver was immaterial and harmless, if erroneous, where the rights of recovery were the same in either capacity. *pp. 538, 539.*

TRUSTS.—*Absconding Officer.*—*Court may Appoint Trustee to Administer Trust Funds.*—The court may, under the provisions of section 8418, Burns' R. S. 1894 (2996, R. S. 1881), appoint a trustee to take charge of trust funds abandoned by an absconding county clerk

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Shepard, Trustee, v. The Meridian National Bank *et al.*

and collect and administer them in the interest of the beneficiaries entitled to them in the absence of such clerk or of anyone authorized and willing to act for him. *pp. 539-542.*

TRUSTS.—*Action to Recover Funds Belonging to Cestuis Que Trust.*—

An action may be maintained by a trustee appointed by the court to take charge of trust funds abandoned by a county clerk, to recover funds embezzled by such clerk without making the *cestuis que trust* plaintiffs in such action. *pp. 542-544.*

SAME.—*Power of Trustee to Maintain Action to Set Aside Fraudulent*

Transfer of Assets.—One appointed by the court to take charge of trust funds abandoned by an absconding county clerk, and administer same for the benefit of the *cestuis que trust*, may maintain an action to set aside a transfer of assets made by such clerk in fraud of the trust, the transferee having knowledge of the trust and participating in the fraud. *pp. 543, 544.*

SAME.—*Recovery of Funds Misapplied by Trustee.*—*Officers.*—Funds

held by a county clerk, as such officer, and wrongfully applied to the payment of his individual liabilities, the creditor having knowledge of the trust and knowing that the money so applied was trust funds, may be recovered in an action by a trustee for the use and benefit of the *cestuis que trust*. *pp. 544-552.*

From the Marion Superior Court. *Reversed.*

William A. Ketcham and Henry N. Spaan, for appellant.

Addison C. Harris and Frank Cutter, for appellee.

HOWARD, C. J.—It is shown in appellant's complaint that on November 12, 1886, John E. Sullivan entered upon the duties of the office of clerk of the Marion Circuit Court, succeeding Moses G. McLain, who held that office for the four years ending on said day. Sullivan held the office until January 31, 1889, when he resigned, and the appellee John R. Wilson was appointed to succeed him, and was afterwards elected as his own successor. During the early period of Sullivan's incumbency of the office, his predecessor, McLain, paid to him moneys in custody of the clerk, belonging to insolvent and decedents' estates, and other trust funds, amounting to nearly \$120,000; and Sullivan himself, during the time he held the office,

Shepard, Trustee, v. The Meridian National Bank et al.

received, in addition, about \$75,000.00 of like trust funds. Previous to his election as clerk, Sullivan had been engaged in business, and had kept an account with the appellee national bank. On November 15, 1886, this account was overdrawn in the sum of \$17,791.02. On that day McLain made his first payment of trust funds to Sullivan, giving him, as clerk, a check for \$10,000.00 on the Indianapolis National Bank. In the body of this check the money was described as paid "on account of trust judgment and fees." Sullivan delivered this check, indorsed by him, to the appellee bank, and said appellee drew the money thereon from the Indianapolis National Bank, and credited the same on Sullivan's individual account, leaving the same still overdrawn. It is alleged that "At the time of receiving said check and crediting said Sullivan with the amount thereof, said Meridian National Bank well knew that said McLain had been the clerk of said court as the predecessor of said Sullivan, and that said Sullivan was then and there, the clerk of said court, and that said check was given to him in order to transfer to him, as such clerk, the sum of \$10,000.00, which had theretofore been in the hands of said McLain, as such clerk, in trust for divers and sundry parties." Thereafter, on November 20, 1886, McLain delivered to Sullivan, as such clerk, his second check, being for \$5,000.00, payable to the order of Sullivan as clerk, the payment being also designated in the body of the check as made "on account of trust and judgment funds and fees." On the endorsement and delivery of this check to the appellee bank said appellee opened an account with John E. Sullivan, clerk, delivered to him a pass-book therefor, and gave him credit upon the pass-book and upon his account as clerk for \$4,000.00, but applied the remaining \$1,000.00 of said check to the payment of the in-

Shepard, Trustee, v. The Meridian National Bank *et al.*

dividual indebtedness of Sullivan to the bank, knowing at the same time that said \$1,000.00 was a part of the trust funds in the hands of Sullivan. Thereafter, on December 13, 1886, a third check for \$653.10, drawn by McLain, as clerk, upon the Indianapolis National Bank, and reciting in the body of the check that it was given on account of "trust in asst. and estates (in F. & S.)," was given to Sullivan, and endorsed by him as clerk, and delivered to the appellee bank, and was by said appellee applied on Sullivan's personal debt to the bank, the bank at the same time knowing that said trust funds were not the individual or private property of the said Sullivan, but were in his hands as clerk, in trust for divers and sundry parties. Like allegations are continued in detail, showing the application by Sullivan, with the co-operation and knowledge of the appellee bank, of other trust funds in his hands as clerk, in payment of his personal obligations to the bank, and to other creditors who were paid through the bank, from said trust funds.

During Sullivan's continuance in office he was, besides, engaged in business for himself, in which occupation he also received large sums of money. And it is further alleged in the complaint, "that, by means of his earnings, borrowings, and other methods of obtaining money, although said Sullivan had during his continuance in office as such clerk misappropriated and embezzled, from time to time, very great sums of money, amounting in the aggregate to more than \$150,000.00, he had succeeded in reducing the extent of his defalcation on the 29th day of January, 1889, to the sum of \$47,993.84, as to which he was then, and has ever since been, and now is, a defaulter." The names of the particular persons for whom he received and to whom he failed to pay over this money, in number about 1,500, and the amount due each, are set out in an exhibit to the complaint.

Shepard, Trustee, v. The Meridian National Bank *et al.*

Among the sums of money so misappropriated was \$440, due to the State of Indiana; and it is alleged that the State, by its Attorney-General, on the 5th day of March, 1889, filed in the Marion Circuit Court "its certain complaint in the nature of a creditor's bill, in its own behalf and on behalf of all others similarly situated who should desire to participate therein and contribute to the expense of the litigation against the said Sullivan and others, asking, among other things, for judgment against Sullivan for the money so collected by him as clerk, * * * for the appointment of a receiver to collect the fees due to said Sullivan as such clerk that had not theretofore been collected, and for the appointment of a trustee as the successor of said Sullivan, in relation to the matters that had come to his hands as such clerk, and to recover the trust funds that had come to the hands of said Sullivan as such clerk, and had been used by him in the payment and discharge of his private indebtedness from the parties who had received the same, for the use and benefit of the parties entitled thereto, in such proportion as the court might adjudge. And such proceedings were had in said cause that thereafter, to wit, on the 6th day of March, 1889, this plaintiff was by said court duly appointed receiver of certain of the assets of said Sullivan, and was also appointed as a trustee as the successor of said Sullivan in the various trusts which had, by the statute in such cases made and provided, been imposed upon and confided in said Sullivan."

In the order of appointment, as set out in this complaint, it is declared, that the court "does hereby order, adjudge, and decree that Silas M. Shepard be, and he is hereby appointed as a receiver of this court, for the purpose of collecting and reducing to cash the rights, credits, choses in action named and described

herein, and also as trustee in the matters appertaining to the office of clerk of this court, with respect to the funds collected by said Sullivan as such clerk, as the successor in said trusts of said Sullivan, late clerk." Appellant is particularly directed in said order, amongst other things, "to institute and maintain actions against any and all persons whom he may have reasonable cause to believe have heretofore received from said Sullivan, as such clerk, trust funds that were then and there in his hands as such clerk, in payment of his individual indebtedness, or that were otherwise misappropriated by him."

It is further shown that the fees due Sullivan and collected or to be collected by the receiver will amount to not over \$5,000.00, and will be totally inadequate to pay the liabilities of Sullivan as clerk. It is also made to appear that the sureties on Sullivan's official bond have been exhausted, leaving all the creditors except those who have obtained judgments on his bond wholly unpaid; that Sullivan has fled the country, and is wholly insolvent, and said creditors of said trust funds will be wholly remediless unless the funds misappropriated can be followed, and applied to the liquidation of their claims.

It is alleged that before the bringing of this action the appellant had applied to the appellee bank for an accounting of the trust funds of Sullivan so used by it, but the bank refused so to account, or to pay any of said funds to him. The appellant concludes his complaint, saying, therefore: "That a cause of action has accrued to him as such receiver and trustee, as the successor of said Sullivan in his various trusts, to compel the said defendant, the Meridian National Bank, to account and show what amount of trust funds it received from said Sullivan as such clerk that it applied to the payment and discharge of his in-

Shepard, Trustee, v. The Meridian National Bank *et al.*

dividual and personal liabilities; that as to such funds it be adjudged and decreed to be a trustee of its own wrong for the misappropriations, embezzlements, and conversions of said Sullivan in which it participated, and of which it obtained the benefit; and plaintiff prays the court to decree accordingly and that he have judgment."

The appellee bank filed its motion to require the appellant to elect whether he would sue as receiver or as trustee, which motion was sustained by the court. This ruling is one of the alleged errors complained of by appellant, but, as the motion has not been brought into the record by bill of exceptions or otherwise, no question is presented on the ruling. Besides, we are of the opinion that appellant has suffered no harm by the action of the court. He elected to sue as trustee, and anything that he might be entitled to recover in any capacity he may recover in this action as trustee. He was appointed receiver to collect fees and other amounts due Sullivan, but not collected by him, and also trustee "with respect to the funds collected by said Sullivan as such clerk." It is not apparent, however, nor do counsel satisfactorily show, why appellant as receiver, had not authority to take possession, not only of funds due Sullivan, and not collected by him, but also of all trust funds to which Sullivan was entitled, whether he had collected such funds or not. It was but one appointment, and there was but one officer, whether he be called receiver or trustee, or both. As receiver he was trustee of all assets belonging to Sullivan as clerk, and there does not seem to have been sufficient reason at any time to distinguish between his duties as receiver and his duties as trustee. The error, however, if any, is, as we have seen, immaterial, for the reason that, whether styled receiver or trustee, appellant is before the court as the representative

Shepard, Trustee, v. The Meridian National Bank *et al.*

of the trust estate, and to recover for the estate all that is due to it from any source.

Appellant afterwards, as receiver, brought another action against appellees, the complaint and the parties being identical, except that in the case here appealed the plaintiff was styled trustee, and in the other receiver. The court overruled a motion by the bank to require the appellant to elect as to which of said actions he would pursue. The two cases accordingly went to judgment, and both have been appealed, the appeal in the receivership case was also decided at this term. See *Shepard, Rec., v. Meridian National Bank, ante*, 20.

Afterwards the appellee bank filed its demurrer to the complaint, for the reasons: "First, that the plaintiff has no legal capacity to sue; second, that the complaint does not state facts sufficient to constitute a cause of action against this defendant." This demurrer was sustained by the court, and the ruling so made presents the chief questions for our consideration.

It will hardly be doubted that John E. Sullivan, as clerk of the Marion Circuit Court, received the funds in controversy as in trust for the numerous beneficiaries for whom they were, under the law, paid to him. While the naked legal title was in him as custodian, the beneficial interest was in others. Whether paid to him by administrators, guardians, assignees or other trustees, such funds were, in each case, trust funds to be held by him for the real owners.

Some question is made as to whether, on the resignation and absconding of Sullivan, his successor in office, the appellee John R. Wilson, did not succeed to him as rightful custodian of the trust funds which had been in his hands. There is no doubt that Mr. Wilson would have been entitled to receipt for such

Shepard, Trustee, v. The Meridian National Bank *et al.*

funds if they had been paid over to him by Sullivan, or by any one else in his place, and that, as such successor, he would thus have become liable on his bond for their safe keeping; and it would seem, therefore, that such succeeding clerk, as lawful custodian, might have brought suit to recover the funds. It was said by Howk, C. J., in *Board, etc., v. McFadden*, 88 Ind. 333, that "Where moneys are paid to and received by the clerk of the court on judgments therein rendered, the clerk is liable therefor in his official capacity; and, therefore, at the expiration of his term of office, if such moneys have not been paid to the person who is entitled to demand and receive the same, it is his duty, we think, to pay over and deliver such moneys to his successor in office."

The question is, however, not controlling in this case. Whether or not Mr. Wilson might have brought suit to recover the trust funds lost by his predecessor, it is certain that he did not bring, or offer to bring, any such suit. He was made a party defendant in the suit brought by appellant, to answer as to any right or interest which he might have in the matter. In the complicated condition in which the affairs of the clerk's office were left by the delinquencies of his predecessor, it may have been thought better that the affairs in which Sullivan was himself concerned should be totally divorced from the administration of the affairs of any official afterwards in charge of the office.

But by operation of the statutes a trust had been created as to the misappropriated funds, and such trust a court of equity must protect and defend. Because the former clerk had fled the country, or because the present clerk did not see his way to take up the duties of the delinquent, the court would not, therefore, be helpless. As said in *Tiffany and Bullard*

Trusts and Trustees, 2: "It is a well settled principle in equity, that a trust once properly created shall never fail for want of a trustee. It is a rule in equity to which there is no exception, that a court of equity never wants a trustee. Therefore if a trust has been properly created and no trustee has been appointed, is incompetent, or has refused to accept, or has died, the trust shall not fail on that account." And in Underhill Trusts and Trustees, 406, the author says: "Where a trustee is a felon, or a bankrupt, and refuses to join in the appointment of a new trustee in his place, the court can and will remove him, and appoint another person if the *cestuis que trust* desire it; and a similar observation applies to a trustee who has become a lunatic, or has gone to reside permanently abroad or has absconded."

The statutes are to the same effect. In section 3418, Burns' R. S. 1894 (2996, R. S. 1881), it is provided that, "If any trustee of any trust now existing shall be dead, or any trustee of a trust now or hereafter to be created shall die or for any cause refuse to act, the circuit court or the superior court of the proper county may fill the vacancy by appointment of some suitable person, who shall execute bond for the faithful performance of the duties of his trust, as hereinbefore provided." And in the succeeding section it is said: "Said trustee and the funds in his hands shall be at all times under the equitable control of the court having jurisdiction thereof for the preservation of the funds and carrying out the purposes of the trust."

The court could not, of course, appoint a clerk to succeed Sullivan. That duty devolved, at first, upon the board of county commissioners, and then upon the people at the next general election. The court, however, in the absence of Sullivan, or of any one authorized and willing to act for him, did have, as we think,

Shepard, Trustee, v. The Meridian National Bank *et al.*

the right to appoint some one to take charge of the trust funds abandoned by him, and to collect and administer them in the interest of the beneficiaries entitled to them.

The question is also raised as to whether the proper parties plaintiff here were not the beneficiaries themselves, and whether this trustee had a right to sue for them. The complaint shows that the beneficiaries are exceedingly numerous, being about 1,500; that sums due many of them are small in amount; and that it was, therefore, for many reasons, undesirable, if not impracticable, for suit to be brought in the names of all of them. The State of Indiana was one of the beneficiaries, and brought the action in its own name and for all the other beneficiaries, asking for the appointment of a receiver and trustee, as the most practicable and equitable method of proceeding to recover the funds which had been in custody of the absconding clerk; and the court, on this petition, made the appointment.

In 2 Perry Trustees, section 885, the author says: "Where the parties in interest are so numerous that it is not possible or convenient to join all as plaintiffs, the court will allow a few *cestuis que trust* to sue in behalf of themselves and the others."

In 1 Pomeroy's Eq. Juris., section 255, it is said that a suit in equity may be brought, when, for example, "A number of persons have separate and distinct interests, but still united by some common tie, against one determined party, and their interests may perhaps be enforced by one equitable suit brought by all the persons joining as co-plaintiffs, or by one suing on behalf of himself and all the others, or even by one suing for himself alone."

"The grand principle which underlies the doctrine of equity in relation to parties," said the last named author in his work on Remedies and Remedial Rights,

Shepard, Trustee, v. The Meridian National Bank *et al.*

section 247, "is, that every judicial controversy should, if possible, be ended in one litigation; that the decree pronounced in the single suit should determine all rights, interests, and claims, should ascertain and define all conflicting relations, and should forever settle all questions pertaining to the subject-matter."

It is finally urged against the right of this appellant to sue that at most he takes the place of the defaulting clerk, and can consequently maintain only such suits as such clerk could himself have maintained. Whether this contention could, in any respect be sustained as to appellant, as trustee for the creditors of the clerk may be questioned. On the contrary, appellant, as trustee for the creditors, the character in which he maintains this action, has every right as plaintiff which the creditors themselves would have if they had brought the action in their own names. But, even as receiver, appointed solely to protect the trust estate in the interest of the beneficiaries, it may be doubted whether he could not have maintained an action against the appellee bank to set aside the transfers made to such bank in fraud of the rights of such beneficiaries. In *State, ex rel. v. Sullivan*, 120 Ind. 197, to which counsel for appellees refer us, it was said that, while the general rule is that a receiver cannot have any right of action not vested in the debtor, yet that there are exceptions to the general rule, and one such exception is, that a receiver may maintain a suit to set aside a fraudulent conveyance. All that was decided in the case cited is that, as the debtor could not have brought a suit against himself, the receiver could not do what would be equivalent to bringing such suit; that is, could not bring suit upon the debtor's official bond. That, however, is a very different thing from bringing suit to set aside a fraudulent conveyance, or to set aside a transfer of assets made in

Shepard, Trustee, v. The Meridian National Bank et al.

fraud of the trust estate, which the debtor, for the time, represented, the grantee or transferee having knowledge of the trust, and so participating in the fraud.

The right of a receiver to bring an action to set aside such a fraudulent transfer was clearly indicated in *Wallace v. Milligan*, 110 Ind. 498, Zollars, J., there saying: "Where an action might not have been maintained by the firm, it cannot be by the receiver, except when the firm may have been guilty of a fraud against its creditors. High, Rec. (2d ed.), sections 205, 315, 316." See further, 20 Am. and Eng. Enc. Law, 239, 240; also, 27 Am. and Eng. Enc. Law, 251, and cases in notes. In any case, the suit was properly brought in the name of the appellant as trustee, representing, as he does, the rights of the beneficiaries, as the real owners of the trust estate.

But the demurrer not only questions the capacity of the plaintiff to sue, but also denies that the complaint shows any liability on the part of the appellee bank, and this is the important question for our consideration. In the complaint, as epitomized by counsel for appellees, "The charge is that during his clerkship, the bank applied, with Sullivan's direction and consent, to Sullivan's individual debts, sums of money. The amount is not stated directly, but it is averred that certain amounts were applied to the payment of indebtedness due the bank, and certain other amounts were applied in payment of checks drawn by Sullivan arising out of his individual business, which, together, would seem to aggregate, as we add the figures given, to \$97,443.71. It is charged that the bank 'participated and co-operated with and aided and abetted Sullivan in such illegal and tortious use of such funds;' that the bank knew that Sullivan was mingling the funds in his hands as clerk with his private funds, so

Shepard, Trustee, v. The Meridian National Bank et al.

as to render it difficult, if not impossible, to distinguish the one from the other, or for any of the parties on whose account Sullivan, as such clerk, had received moneys, to specifically follow a specific fund belonging to or deposited by, or on account of, any particular party; of all which the bank had notice, and participated and co-operated for the purpose of concealing and covering up the fact of his improper use of such funds, and preventing the parties from recovering from it the moneys which it had received from Sullivan as clerk."

On this showing an accounting is demanded from the bank as to "what amount of the trust funds it received from said Sullivan as such clerk, that it applied to the payment and discharge of his individual and personal liabilities; that as to such funds it may be adjudged and decreed to be a trustee of its own wrong for the misappropriations, embezzlements, and conversions of said Sullivan, in which it participated, and of which it obtained the benefit."

Counsel cite many decisions of this court which hold, and rightfully, as we believe, that moneys entrusted to a public official as such, are not held by him as a mere agent, bailee, or trustee. For the safety of such funds, the officer is held to have a certain technical ownership of them, so that, in case they are lost, even without his fault, it is as if his own moneys were lost, and he is required to account for them as a debtor, and to pay them over to the person or persons entitled to receive them. But the beneficial interest in such funds is not in the public officer. As to such interest, he holds the funds in trust for the persons to whom he is required to pay them over, when rightfully demanded of him. The purpose of the decisions cited was not to lessen, but rather to increase, the responsi-

Shepard, Trustee, v. The Meridian National Bank *et al.*

bility resting upon one who, by reason of his official station, is entrusted with the custody of funds not his own.

The spirit and purpose of such holding is well expressed in *Bocard, v. State, ex rel.*, 79 Ind. 270, one of the cases cited by counsel, where it was said, speaking of a township trustee's technical ownership of the township funds: "That he is thereby made responsible to the township for the money received by him to the same extent that a banker becomes responsible for money deposited with him on general account, and hence, to a much greater extent than if he were the mere agent, bailee, or trustee of the township, for the safe keeping and disbursement of the specific fund." See, also, *Rowley v. Fair*, 104 Ind. 189, and other authorities cited in *Winchester v. Veal*, 145 Ind. 506.

Another class of cases cited for appellees are, as we think, inapplicable to the questions here involved. The question here is not whether, because the appellee bank knew that the funds deposited by Sullivan were trust funds, it therefore follows that the deposit became a special and not a general one. The question here is whether the bank acted fraudulently in participating in Sullivan's misappropriation of funds. Appellant is not seeking to follow these trust funds on the claim that their payment to the bank constituted them a special deposit. Trust funds may be placed in a bank as a general deposit, quite the same as any other funds, and they become thereby, as in case of any general deposit, the property of the bank; the banker and the depositor assuming, as in other cases, the relation of debtor and creditor. It is true, also, of course, as held in *McLain v. Wallace*, 103 Ind. 562, that "the addition of the word 'clerk' to the name of a general depositor does not make the deposit a special one, nor does it change the liability of the bank."

In *Fletcher v. Sharp*, 108 Ind. 276, Judge Mitchell, a jurist referred to with deserved praise by the brilliant counsel for appellees, thus aptly distinguishes the points here discussed, and so clearly indicates the question for our decision: "When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust moneys, or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund." And he adds, immediately, "If in receiving a trust fund a bank acted with knowledge that it was taking the fund in violation of the duty of the trustee, the rights of the *cestui que trust* might be different." Still more significant is the following from another part of the same opinion: "Nor does the case involve any question as to the right of the bank to appropriate the fund for an indebtedness due from the depositors, as in *Bundy v. Town of Monticello*, 84 Ind. 119." That, however, is the exact question here involved.

It is claimed by counsel for appellees that as the trust funds deposited by Sullivan became the property of the bank, as being a general, and not a special, deposit, therefore it was no fraud upon the beneficiaries of such funds to apply them upon the private debts and obligations of Sullivan himself. A statement of such a contention ought to be its own sufficient refutation. No doubt, as also said by Judge Mitchell, in *Lamb v. Morris*, 118 Ind. 179, "It is the right of the bank, in case the depositor becomes indebted to it, by note or otherwise, and the deposit is not specially applicable to a particular purpose, or there is no express agreement to the contrary, to apply a sufficient amount thereof to the payment of any debt due and

Shepard, Trustee, v. The Meridian National Bank *et al.*

payable from the depositor to the bank. * * * *
This results from the right of set-off, which obtains between persons occupying the relation of debtor and creditor, and between whom there exists mutual demands. It is familiar law, however, that mutuality is essential to the validity of a set-off, and that, in order that one demand may be set off against another, both must mutually exist between the same parties. Accordingly, it is settled that a bank can claim no lien upon the deposit of one partner, made on his separate account, in order to apply it on a debt due from the firm, nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal and the others sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice. It follows that, in the absence of a contract giving it the right to do so, the bank could not have applied money due the petitioner, as a depositor, to the payment of the note upon which he was surety, any more than it could have successfully pleaded the note as a set-off, in case the petitioner had brought suit to recover the balance due him on deposit." Will it be said that there was any mutuality between the money due upon the overdrawn private account of Sullivan, or upon any of his other personal obligations, on the one side, and the trust funds deposited by him as clerk on the other, the bank having at the same time two accounts open with him, one the overdrawn account with him personally, and the other the trust account with him as clerk? He stood to the bank, even as found upon its own books, in two distinct capacities, quite the same as if the business man and the clerk were two different persons.

The quality of mutuality in set-off is quite analogous to that of former adjudication, concerning which

Shepard, Trustee, v. The Meridian National Bank *et al.*

it has been said, that "The thing demanded must be the same, the demand must be founded upon the same cause of action, the demand must be between the same parties and found by them against each other in the same quality." *Jones v. Vert*, 121 Ind. 142; *Kitts v. Willson*, 140 Ind. 604. The same person may be administrator, guardian, agent, or other trustee, and may also be doing business on his own account. If he mingles all his accounts, and makes a general deposit in bank, the bank, acting in good faith and without notice, might perhaps set-off any part of such deposit against any indebtedness of his to the bank. But, if the administrator makes one deposit, the guardian another, the agent a third, and the private business man a fourth, the bank, thus having knowledge of the nature of the several deposits, could not pay a debt to one account by drawing upon another, unless in some such exceptional cases as indicated in *Lamb v. Morris*, *supra*.

In *Bundy v. Town of Monticello*, *supra*, Joseph C. Wilson was one of the trustees of the town of Monticello, and was also president of the First National Bank of that town. He became indebted to the bank in a large amount, defaulted, and fled the country. After his default, he sent a written order to the receiver of the bank, directing him to apply the sum of \$9,013.00, deposited to his credit as "J. C. Wilson, trustee," in payment of his personal obligations to the bank. The court found that Wilson was trustee of the town, that he sold the bonds of the town, received the money therefor, "and afterwards deposited money in the bank to the credit of himself as trustee. It did not appear that he was the trustee of any other person, or that he had control of any other trust fund." Upon these facts the trial court found that the fund in question was the money of the town, and this conclu-

Shepard, Trustee, v. The Meridian National Bank *et al.*

sion was upheld on appeal to this court. It was further held on the appeal that, since the fund belonged to the town, it could be recovered from Wilson, the trustee, and from anyone else having possession of it with notice of the trust.

The court continued: "Did the bank have such notice? On the 5th day of August, 1879, Wilson gave the receiver of the bank an order to apply the sum so deposited to his credit, as trustee, upon any sum that he owed the bank. At the time he owed the bank a larger sum than the fund in question, and, while it did not actually apply such sum upon his indebtedness, we will treat the question under discussion precisely as though the application had been made. No notice, at this time, of the character of the fund had been given to the bank, other than such as was imported by the manner of the deposit. The fund was deposited to 'J. C. Wilson, trustee,' and the question arises whether this fact was notice of its character. We think it was. Wilson had an account with the bank from which the money in question was checked, and he then placed it to another account. The latter was unlike the former in this, that it was 'J. C. Wilson, trustee.' The word 'trustee' meant something. It was not merely *descriptio personae*, but was a description of the fund deposited. It imported the existence of a trust and was notice of the character of the fund. Besides, it was unusual and out of the ordinary course of business to open two accounts with the same person for the same fund, and this fact, coupled with the further fact that it was deposited by him as trustee, and not in the usual way, was sufficient notice that the fund was held in trust."

These words, with a change of names and dates and a substitution of "clerk of the circuit court" for "town trustee," might have been written for the case

Shepard, Trustee, v. The Meridian National Bank *et al.*

at bar. The cases are alike, even as to the two bank accounts, personal and fiduciary; and, as a recovery was decreed against the bank in favor of the beneficiary in the former case, there appears no reason why such a recovery should not be had in the latter.

In *Bundy v. Town of Monticello*, *supra*, the court cited from *National Bank v. Insurance Co.*, 104 U. S. 54, the following, also in point here: "When against a bank account, designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation."

"Equity," says Mr. Pomeroy, "impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable for all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a *bona fide* purchaser for valuable consideration and without notice." 2 Pomeroy's Eq. Jur., section 1048.

In Underhill, Trusts and Trustees, 487, n. 3, it is said: "Where a fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund, and by the direction of the tenant for life only, they transferred it to his account, and thereby obtained payment of a debt due from him to them, it was held that the trustees might

The City of Shelbyville v. Phillips.

sue the bankers to have the trust fund replaced." And in Hill, Trustees, *522, it is said: "If it can be actually proved by means of the checks or otherwise, that the payment was made with trust-money, that will unquestionably be the best evidence for this purpose." See, also, *Chandler v. Schoonover*, 14 Ind. 324; *Austin v. Willson's Executors*, 21 Ind. 252; *Wallace v. Brown*, 41 Ind. 436; *Bevis v. Heflin*, 63 Ind. 129; *Nugent v. Laduke*, 87 Ind. 482.

It is clear that the complaint was sufficient, and the court erred in sustaining the demurrer to it. Judgment reversed.

THE CITY OF SHELBYVILLE v. PHILLIPS.

149 553
150 571
151 581

[No. 18,184. Filed Dec. 7, 1897. Rehearing denied Feb. 18, 1898.]

SUBMISSION OF CONTROVERSY. — *Agreed Case.* — *Jurisdiction.* — The court has no jurisdiction to hear and determine a cause submitted as an agreed case, under section 562, Burns' R. S. 1894 (553, R. S. 1881), where no affidavit was made that the controversy was real, and that the proceedings were brought and submitted in good faith. p. 553.

SAME. — *Appeal and Error.* — *Exception.* — In order to present any question on appeal from a decision of the trial court on an agreed case an exception must be saved to the decision or finding of the court. p. 553.

SAME. — *Appeal and Error.* — *Record.* — Where the record does not show that the facts agreed upon constituted all of the evidence in the trial of a cause on an agreed statement of facts it will be presumed that the facts relied upon by the court were such as to justify the finding. pp. 553, 554.

From the Bartholomew Circuit Court. *Affirmed.*

David L. Wilson, for appellant.

K. M. Hord, *Ed. K. Adams*, and *Lee F. Wilson*, for appellee.

HOWARD, C. J. — On November 8, 1894, appellee was charged before the mayor of the city of Shelbyville

The City of Shelbyville v. Phillips.

with having violated an ordinance of said city, by opening his saloon on November 6, 1894, the day of a general election. Such proceedings were had that the appellee was found guilty of the offense charged, and fined therefor; that an appeal was taken to the circuit court of the county, from which, on change of venue, the case went to the court below; and that on June 20, 1896, there was a finding for the appellee, and judgment entered in his favor. From this judgment the city appeals.

The only question involved in the issues and argument of counsel relates to the validity of the ordinance of the city of Shelbyville, but the question so sought to be presented is not properly saved for our decision, by reason of the condition of the record as brought here upon this appeal.

An effort seems to have been made to try this as an agreed case, under section 562, Burns' R. S. 1894 (553, R. S. 1881). There was an agreed statement of facts, "made out and signed by the parties," as prescribed in that statute. But there was no "affidavit that the controversy is real and the proceedings in good faith," as also required. The court had, therefore, no jurisdiction to determine the case, as so brought. *Sharp v. Sharp's Administration*, 27 Ind. 507; *Manchester v. Dodge*, 57 Ind. 584. There was, besides, no exception to the decision or finding of the court, which has often been held necessary in an agreed case. *Fisher v. Purdue*, 48 Ind. 323; *Warrick, etc., Ass'n v. Hougland*, 90 Ind. 115; *Pennsylvania Co. v. Niblack*, 99 Ind. 149.

As in the case last cited, the case at bar was rather "a trial upon an agreed statement of facts used merely as evidence." This statement of facts is brought into the record by bill of exceptions, but the bill does not state that the facts, as so agreed to, constituted all the evidence given in the cause. There is nothing in the

Fitch v. Byall.

record to show what were the facts upon which the decision rested, and the court may have been influenced by evidence that does not appear in the bill of exceptions. We must presume that the facts relied upon by the court were such as to justify its finding, and hence that the motion for a new trial was properly overruled.

No error appearing, the judgment is affirmed.

MCCABE, J., is of the opinion that this case should be transferred to the Appellate Court, and dissents for this reason only.

HACKNEY, J., did not participate in this decision.

FITCH v. BYALL.

[No. 18,288. Filed February 23, 1896.]

149 554
148 607
150 451
151 207
151 244
152 198
153 489
149 554
156 30

JUDGMENT.—*Relief From Judgment Taken Before Justice of Peace Through Excusable Neglect.*—*Statute Construed.*—Section 399, Burns' R. S. 1894 (396, R. S. 1881), providing relief from a judgment taken through mistake or excusable neglect, is not applicable to judgments taken before a justice of the peace; and the filing of a transcript of such judgment in the office of the clerk of the circuit court will not make it a judgment of the circuit court, or give such court authority to grant relief therefrom. *p. 556.*

SAME.—*Judgment Taken Before Justice of Peace.—Excusable Neglect.—Relief.*—Relief, after thirty days, from a judgment taken by default before a justice of the peace, is by a proceeding in the circuit court for a new trial, under section 1571, Burns' R. S. 1894 (1508, R. S. 1881). *p. 557.*

SAME.—*When Collection of Judgment May be Enjoined.* The collection of a void judgment may be enjoined, but not so where it is merely irregular or erroneous. *p. 557.*

PLEADING.—*Complaint.—Exhibit.—Summons.*—In an action to set aside a judgment for want of proper service, a copy of the summons filed with the complaint as an exhibit, but not made a part thereof, cannot be considered in determining the sufficiency of the complaint. *p. 557.*

JUDGMENT.—*Collateral Attack.*—The judgment of a justice of the peace is not open to collateral attack, where the defendant is a resident of the township in which the suit is brought, and the

Fitch v. Byall.

facts necessary to confer jurisdiction over the person of the defendant appear affirmatively upon the face of the record. p. 558.

APPEAL AND ERROR.—*Bill of Exceptions.*—*Record.*—The evidence is not in the record where the record does not show that the bill of exceptions was filed in the clerk's office after it was signed by the judge. p. 559.

SAME.—*Bill of Exceptions.*—*Longhand Manuscript of Evidence.*—Prior to the taking effect of the act of March 8, 1897 (Acts, 1897, p. 244), it was necessary that the record should affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions. p. 560.

From the Allen Circuit Court. *Reversed.*

Wilmer Leonard and *Elmer Leonard*, for appellant.

B. F. Harper, for appellee.

MONKS, J.—It appears from the complaint that appellant, on the 21st of October, 1895, commenced an action before a justice of the peace of Allen county, on two promissory notes; that a summons was issued and placed in the hands of a constable of the township, commanding him to summon appellee to appear before said justice of the peace in said cause on October 25, 1895; that said writ was served on one Isaac Byall by leaving a copy of said summons at his last and usual place of residence; that on October 25, 1897, judgment was rendered by said justice of the peace by default against appellee; that the summons issued in said action was never served upon appellee by reading or otherwise, and he never received or had any notice of any kind, or from any source, of the pendency of said action, or the rendition of said judgment, until the 8th day of February, 1896. Facts showing a meritorious defense to the action brought before the justice of the peace are alleged. It is also alleged that the judgment was taken against appellee through his excusable neglect, and that he would have pleaded and proved the defense alleged if he had been notified of said action; that appellant has caused a transcript

Fitch v. Byall.

of said judgment to be filed in the office of the clerk of the court below, which operates as a lien on the property of appellee. Prayer: "That said judgment be annulled, and that said default be set aside, and that he [appellee] be allowed to make his defense." Appellant's demurrer to the complaint for want of facts was overruled.

The issues formed were tried by the court, and upon a finding in favor of appellee, over a motion for a new trial, judgment was rendered that said judgment of the justice of the peace be "opened and vacated so as to enable the defendant [appellee] to make his defense therein, and the justice of the peace is ordered to allow defendant [appellee] in said action to make his defense to the same," etc.

The theory of appellee and the trial court was that the proceeding was brought to relieve appellee from a judgment taken against him through his excusable neglect. Such a proceeding is governed by section 399, Burns' R. S. 1894 (396, R. S. 1881), which does not apply to proceedings before justices of the peace. *Brown v. Goble*, 97 Ind. 86; 6 Ency. Pl. and Prac., 149. Said section does not authorize circuit or superior courts to relieve a party from a judgment taken against him before a justice of the peace. Under said section, the application for relief from a judgment must be made to the same court in which the same was rendered. 6 Ency. of Pl. and Prac., 149. Filing a transcript of the judgment of the justice of the peace in the office of the clerk of the court below, under the provisions of sections 624, 625, Burns' R. S. 1894 (612, 613, R. S. 1881), was to make the judgment a lien on appellant's real estate in Allen county, and did not make the same a judgment of the trial court, or give it any authority to grant relief therefrom, under section 399 (396), *supra*; 6 Ency. of Pl. and Prac., 150.

Fitch v. Byall.

When a judgment is taken before a justice of the peace, through the mistake, surprise, inadvertence or excusable neglect of a party, and the same is not discovered until after the expiration of thirty days from the rendition of the judgment, the remedy is by an application to the circuit court for an appeal, under section 1571, Burns' R. S. 1894 (1503, R. S. 1881), which provides that "Appeals may be authorized by the circuit court after the expiration of thirty days, when the party seeking the appeal has been prevented from taking the same by circumstances not under his control." *Kreite v. Smith*, 3 Ind. App. 64; *Brooks v. Harris*, 42 Ind. 177. It is clear that the complaint was not sufficient to entitle appellee to any relief under section 399 (396), *supra*. Neither was the complaint sufficient to entitle him to an injunction against the enforcement of the judgment of the justice of the peace upon the ground that the same was void. The collection of a void judgment may be enjoined, but, where it is merely irregular or erroneous, it cannot be enjoined. *Earl v. Matheney*, 60 Ind. 202; *Gum-Elastic, etc., Co. v. Mexico, etc., Co.*, 140 Ind. 158, and cases cited on p. 163. A copy of the summons issued by the justice of the peace in said cause, showing that the constable was commanded to serve Isaac Byall, the person whom it is alleged was served, instead of Isa A. Byall, the appellee, is filed as an exhibit to the complaint, but is not thereby made a part of the complaint, and cannot be considered in determining the sufficiency of such complaint. *Gum-Elastic, etc., Co. v. Mexico, etc., Co.*, *supra*, and cases cited. We are not, therefore, called upon to determine what effect, if any, the facts shown by said exhibit would have if properly alleged in the complaint. There is no charge of fraud in obtaining or entering the judgment made in the complaint, either against the parties or officers. It is not

Fitch v. Byall.

alleged that a proper return of service was not made upon the summons issued, nor is it averred that the entry of the judgment on the justice's docket does not show due service of process. All the allegations of the complaint may be true, and yet the entry of the judgment of the justice of the peace may show that process was issued, and that the officer to whom the same was delivered made a return of service upon such summons. If such facts are shown, then the record of the justice of the peace affirmatively shows jurisdiction. *Hume v. Conduitt*, 76 Ind. 598, 600. The rule is that the return of the officer that process was served cannot be contradicted by the parties. *Hume v. Conduitt*, *supra*, and cases cited on p. 600. The judgment of a justice of the peace is not open to collateral attack, where the defendant is a resident of the township in which the suit is brought, and the facts necessary to confer jurisdiction over the person of the defendant appear affirmatively upon the face of the record. *Hume v. Conduitt*, *supra*; *Indianapolis, etc., R. W. Co. v. Harmless*, 124 Ind. 25; *Turner v. Conkey*, 132 Ind. 248, and cases cited on pp. 250, 252; *Friedline v. State*, 93 Ind. 366; 6 Ency. Pl. and Prac., p. 148.

Under the statutes of this State, no person who is a resident of any township in the State can be sued before a justice of the peace out of the township in which he resides, unless said suit is commenced by *capias ad respondendum*, or when there is no justice of the peace competent to act in said township. Sections 1498, 1499, 1508, Burns' R. S. 1894 (1431, 1432, 1441, R. S. 1881); *Michael v. Thomas*, 24 Ind. 72; *Wilkinson v. Moore*, 79 Ind. 397. It is true that under such statute, where a resident of this State is sued upon contract, and judgment rendered, without an appearance of the defendant, before a justice of the peace out of the township in which he resides, and the action is not

Fitch v. Byall.

commenced by *capias ad respondendum*, and there is a justice of the peace competent to act in the township where the judgment defendant resides, the enforcement thereof may be enjoined, even though the summons was properly issued and served, and the entry of the judgment shows such service, and the judgment appears valid upon its face. *Johnson v. Ramsay*, 91 Ind. 194; *Brown v. Goble*, 97 Ind. 86; *Grass v. Hess*, 37 Ind. 193; *Brickley v. Heilbruner*, 7 Ind. 488.

The collection of the judgment in the class of cases to which *Brickley v. Heilbruner*, *supra*, and those following it, belong, was enjoined upon the ground that the defendant was not a resident of the township in which he was sued, and for that reason the justice, under the statute, had no jurisdiction over his person, and could only obtain such jurisdiction by an appearance, which waived the question of jurisdiction over the person, and not upon the ground that the return of service or the recitals in the judgment were false, and could be contradicted. It is not alleged in the complaint that appellee was not a resident of the township in which the suit was commenced, and this case does not, therefore, fall within the class to which *Brickley v. Heilbruner* and those following it belong, but falls within the class to which *Hume v. Conduitt*, *supra*, belongs, and is ruled thereby.

It follows that the court erred in overruling appellant's demurrer to the complaint. The evidence is not in the record, for the reason that the record does not show that the bill of exceptions was filed in the clerk's office after it was signed by the judge. *Ayres v. Armstrong*, 142 Ind. 263, and cases cited; *Ueker, Admx., v. Bedford Blue Stone Co.*, 142 Ind. 678, and cases cited; *Robinson v. Dickey*, 143 Ind. 205, 210, and cases cited; *Wenning v. Teeple*, 144 Ind. 189, 192; *Drake v. State*, 145 Ind. 210, 217-218, and cases cited.

The Franklin National Bank *et al.* v. Whitehead *et al.*

Even if the bill of exceptions was filed after it was signed by the judge, as required by law, the evidence is not in the record for the further reason that the record does not affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions and signed by the judge. *Garrett v. State, ex rel., ante*, 264. This appeal was filed August 6, 1896, and is not, therefore, governed by the provisions of the act approved March 8, 1897 (Acts 1897, p. 244), concerning the manner in which the evidence may be made a part of the record upon appeal. No question is therefore presented by the assignment of errors that the court erred in overruling the motion for a new trial. The judgment is therefore reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

THE FRANKLIN NATIONAL BANK ET AL. v. WHITEHEAD
ET AL.

[No. 18,108. Filed February 24, 1898.]

CORPORATIONS.—Powers Of—A corporation possesses only such powers as are expressly given by law, and such implied powers as are necessary to enable it to exercise the powers expressly given. *p. 568.*

SAME.—Manufacturing Corporation.—Warehouseman.—A corporation organized under the laws for the incorporation of manufacturing and mining companies, for the manufacture and sale of nails and other products of steel and iron, is not authorized to engage in the business of a public or private warehouseman, or to issue warehouse receipts. *p. 568.*

SAME.—Public Warehouseman.—Statute Construed.—A manufacturing corporation not empowered to do the business of a public warehouseman, cannot be authorized to do so by the county auditor upon petition, under section 8704, Burns' R. S. 1894, providing that any person or incorporated company desiring to keep a public warehouse shall be entitled to do so upon receiving a permit therefor from the

149	560
154	597

149	500
159	201

149	500
160	104
149	500
161	422

149	560
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The Franklin National Bank *et al.* v. Whitehead *et al.*

county auditor of the county in which such warehouse shall be kept. 568-570.

CORPORATIONS.—*Pledging Manufactured Goods to Secure Debts.*—*Warehouseman.*—*Statute Construed.*—A manufacturing corporation that has never operated as a warehouseman does not become a private warehouseman within the meaning of section 8720, Burns' R. S. 1894 (6541, R. S. 1881), by issuing to creditors, to secure claims, what purport to be warehouse receipts covering goods kept in the building where they were manufactured. p. 570.

SAME.—*Warehousemen.*—*Issue of Receipts as Security for Debt.*—A public warehouseman has no power to issue warehouse receipts upon his own property in his own possession, and deliver the same as a pledge to secure an indebtedness. If a private warehouseman has such power it is by virtue of section 8724, Burns' R. S. 1894. pp. 570-576.

SAME.—*Pledge of Property by Debtor, When Not a Warehouse Receipt.*—Where a debtor who is not a warehouseman issues a receipt purporting to be a warehouse receipt, on property in his possession and owned by him, for the sole purpose of securing a creditor, the same is not in any sense a warehouse receipt. p. 576.

ESTOPPEL.—*By Conduct.*—To constitute a valid estoppel by conduct, there must be knowledge on the part of the person to be estopped, and there can be no estoppel when there is notice or knowledge on the part of the person relying upon the estoppel. p. 577.

CORPORATIONS.—*Creditors Bound to Know Powers Of.*—Creditors of a corporation organized under the laws for the incorporation of manufacturing and mining companies are bound to know that such corporation has no power to carry on either a public or private warehouse or issue warehouse receipts. p. 578.

WAREHOUSEMEN.—*Authority of to Issue Receipts.*—*Parties Dealing with Must Take Notice.*—Parties dealing with a public warehouseman is held to know that such warehouseman has no authority to issue warehouse receipts on his own property in his warehouse, as a security for his own debts or the debts of others. p. 578.

CORPORATIONS.—*Contracts Ultra Vires.*—*Void Contracts.*—*Estoppel.*—The doctrine that when a corporation enters into a contract merely beyond its powers, which, if made by a private person, would have been binding upon him, and such contract has been performed by the other party thereto, the corporation will not be permitted to deny its power to make such contract, does not apply to contracts that are forbidden by statute, or are contrary to public policy. pp. 578, 579.

PLEDGE.—*Actual or Constructive Delivery of Property to Pledgee.*—The delivery of purported warehouse receipts, to a creditor, by

The Franklin National Bank et al. v. Whitehead et al.

a corporation not authorized to do a warehouse business, is not a constructive delivery of the property, nor is a separation of the property from the rest of a stock of goods, without the knowledge of such creditor, an actual delivery so as to constitute a pledge. pp. 580, 581.

LIEN.—*On Personal Property.—How Given by Creditor.*—There is no mode, under the law of this State, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property, retaining its possession, can give another a lien upon it that can be enforced against any person except the parties thereto. p. 581.

RECEIVERS.—*Insolvent Corporation.—Rights of Creditors.*—When a court has taken possession of the property of an insolvent corporation, and appointed a receiver, the property of the corporation is a trust fund for the payment of its debts, and a general creditor has a lien upon such property, and therefore has a right to intervene and contest the validity, as well as the priority of other claims or asserted liens. pp. 583, 584.

SAME.—*Of Insolvent Corporation.—What Actions Can Be Maintained By.*—A receiver of an insolvent corporation represents the creditors as well as the stockholders, and holds the property for the benefit of both, and, as trustee for creditors, can maintain and defend actions which the corporation could not. p. 584.

From the Hancock Circuit Court. *Affirmed.*

Daniel Wait Howe and Baker & Daniels, for appellants.

W. A. Ketcham, Morris, Newberger & Curtis and F. E. Matson, for appellees.

MONKS, J.—In January, 1894, in a proceeding brought for that purpose, the court below appointed a receiver for the Greenfield Iron and Nail Company, an insolvent corporation, located at Greenfield, Indiana, who took possession of the property of said corporation under the order of the court, for the purpose of applying its assets to the payment of its debts. Appellants, two of the creditors of said corporation, filed their separate intervening petitions, claiming that by virtue of certain receipts, purporting to be public warehouse receipts, issued by said corporation, they had liens upon a large portion of the property of said

The Franklin National Bank et al. v. Whitehead et al.

corporation, and were entitled to have the same set apart and applied to the payment of their claims. To these intervening petitions the receiver and the First National Bank, of Brazil, on behalf of themselves and the other general creditors, filed separate answers. The court made a special finding of facts, upon which conclusions of law were stated against the Franklin National Bank of Brazil, on behalf of themselves and intervening petitioners, and, over their separate motions for a new trial, judgment was rendered against them.

The errors assigned call in question each conclusion of law and the action of the court in overruling the motions for a new trial. It appears from the special finding that the Greenfield Iron and Nail Company was organized on November 3, 1889, under the laws for the incorporation of manufacturing and mining companies, having its office and principal place of business at the city of Greenfield, Indiana. The object of said corporation, as set forth in its articles of association was, "the manufacture and sale of nails, and other products of steel and iron." In December, 1890, said company made a written application to the auditor of Hancock county for a permit to keep a public warehouse, and received a paper purporting to authorize it to operate a public warehouse of class B. Said company never owned or operated a public warehouse of either class A or B, or pretended to, other than the room used in the manufacture of nails, never received any goods, wares, or merchandise on storage, or owned or leased a place for the storage of goods, and never issued any papers purporting to be warehouse receipts, except the papers so designated in this case, and a similar one to one of appellants, the Franklin National Bank, in a transaction similar to the one in which said bank received the papers men-

The Franklin National Bank et al. v. Whitehead et al.

tioned in its intervening petition. The effort of said Greenfield Iron and Nail Company to occupy the position of a warehouseman was to enable it to borrow money without impairing its credit by giving chattel mortgages or making pledges of its stock. While the company was engaged in carrying on its business, the nails manufactured were put in kegs, and upon the head of each keg was branded the name of the company and the kind and size of nails contained therein, and the kegs were placed in rows on one side of the rooms where made. Prior to December 9, 1890, the Greenfield Iron and Nail Company, by its president, applied to appellant the Franklin National Bank for a loan of \$5,000.00 and promised to secure said loan by giving as collateral security therefor a warehouse receipt covering nails of sufficient value belonging to said company; and on the 9th of December, 1890, said bank loaned said company \$5,000.00, for which said company executed its note, payable 120 days after date, endorsed by five persons; and it was required that said company should ship and store said nails in a regular warehouse in Indianapolis. Afterwards, in January, 1891, said company made out a statement showing the sale of 2,670 kegs of nails and the size and kind of nails in each keg, to said bank, valued at \$5,009.95, and at the same time made out a receipt which recited that the Greenfield Iron and Nail Company, in its capacity of a public warehouseman, hereby certifies that it has received of the Franklin National Bank the following described property (describing the kegs of nails the same as in the invoice aforesaid, except no value is mentioned, and the words "marked 'Lot A,'" were used), which is deliverable to the order of said Franklin National Bank upon the return of "this receipt and the payment or tender of proper charges." This receipt was signed by the

The Franklin National Bank et al. v. Whitehead et al.

company. Both of these papers were delivered by said company to the bank for the purpose of complying with its promise to secure said note. Afterwards, in April and May, 1891, loans were made by the National Bank of Rockville to said company, under like arrangements and conditions, to secure which like papers, except the kegs of nails were not designated as being marked "Lot A" or otherwise, were executed and delivered to the National Bank of Rockville. Afterwards, in July, 1893, the company executed and delivered to the Rockville Bank, as additional security for said loans, papers of like kind for "800 kegs of cut steel nails 10 d com." No nails were in fact sold by said company to either of said banks, and said bank made no actual deposit of nails with the company, but said company, at the time said papers were delivered, had in its general stock, in its manufacturing establishment at Greenfield, nails of the kind described in said receipts. The failure of said company to ship the nails to Indianapolis, as agreed with the Franklin National Bank, was not known or assented to until said receipt and invoice were received and accepted by said bank, about February 1, 1891. The nails described in said several receipts were not removed from the room where manufactured and were not set apart or separated from the general stock then on hand of the same and different kinds, nor were they marked "A," or in any other manner except in common with all other nails manufactured by said company. The bank officers of said bank did not know the method of manufacture and storage of said nails or the kind of place where stored, or that said nails, described in the receipt of the Franklin National Bank, had not been set apart and marked "Lot A," as indicated in said receipt to the Franklin National Bank. Nor did they make any

The Franklin National Bank et al. v. Whitehead et al.

inquiry or effort to ascertain the character of the pretended warehouse at Greenfield, or whether said nails were stored therein or at any other place, or as to what had been done or was being done with respect to said nails, but wholly relied upon said receipts. The loans evidenced by said notes were renewed from time to time by giving other notes with the same indorsers, and the same were accepted by the banks in reliance upon the papers held, respectively, as security for said loans. After the execution of said receipts the Greenfield Iron and Nail Company continued to manufacture nails, and when so manufactured the kegs in which they were placed were mingled indiscriminately with other kegs containing nails of a similar kind on hand at the dates of the execution of said receipts to said banks, and kept in the company's building, and sales were made by the company from time to time, and the nails sold were taken indiscriminately from the stock on hand, and no effort was made to distinguish between the nails on hand when said receipts were executed and those subsequently made. That at the time of the execution and acceptance of said receipts the nail company and the appellants intended to create a valid lien on the nails therein described, as collateral security for said loans. On January 4, 1894, the president of the Greenfield Iron and Nail Company gave directions that nails of the same kind and quality specified in the receipts held by said banks, respectively, be set apart and marked for said banks. On said day the company, to secure the Franklin National Bank a lien on said nails, without the knowledge of said bank, commenced to set apart nails of the same kind, quality, and description as those mentioned in the receipt given to said bank, so far as they were on hand, and the same were placed in piles and separated from other nails, and the piles

The Franklin National Bank et al. v. Whitehead et al.

so set apart were designated as "Lot I." This was completed on January 13, 1894, before the appointment of a receiver. It cannot be determined how many of the nails, if any, so set apart were on hand when said receipt was given to said bank. No nails were set apart for the Rockville bank for the lack of time, as the receiver was appointed immediately after the completion of the work of setting apart the nails designated "Lot I." At the time the order was given to set apart said nails, on January 12, 1894, the Greenfield Iron and Nail Company was insolvent and in embarrassed circumstances, and was unable to meet or pay the claims against it, and when said order was given the officers of said company well knew that said company could not continue in business, and said order was made in contemplation and expectation of the appointment of a receiver, and that the same would be wound up as an insolvent concern. The receiver was appointed on January 13, 1894, and took possession of the property of said company, including the nails, in separate piles designated as "Lot I," but in resorting the nails in order to take an invoice, and in removing them from exposure to the weather, the nails in said piles were mingled with other nails of the same kind in the building. No warehouse charges for storage or other expenses were charged by said company against the holders of said receipts, nor was any scale or schedule of charges ever fixed or adopted by said company.

To constitute a valid pledge, there must be an actual or symbolical delivery of possession of the thing pledged, and, to preserve the pledge, the pledgee must retain the possession of the property. Ordinarily the physical possession of the property is delivered to and retained by the pledgee. If, however, the property is delivered by the owner to a warehouseman and a

The Franklin National Bank et al. v. Whitehead et al.

warehouse receipt is given therefor by the warehouseman, the endorsement of the warehouse receipt, and the delivery thereof to the pledgee is regarded, in law, as the delivery of possession to the pledgee of the property described in the warehouse receipt. Sections 8716, 8722, 8729, Burns' R. S. 1894 (6537, 6543, 6550, Horner's R. S. 1897); Hale on Bailments, 127; Jones on Pledges, sections 23, 280, 281, 287.

The first question to be determined is whether the Greenfield Iron and Nail Company was authorized to engage in the business of public warehouseman, and as such issue warehouse receipts.

The special finding shows that said Greenfield Iron and Nail Company was organized under the laws for the incorporation of manufacturing and mining companies, and that its object, as stated in the articles of association, was to manufacture and sell nails and other products of steel and iron. A corporation possesses only such powers as are expressly given by law, and such implied powers as are necessary to enable them to exercise the power expressly given. *State Board of Agriculture v. Citizens Street R. W. Co.*, 47 Ind. 407, 409; Clark on Corp., 120. The business of public warehouseman was not necessary or incidental to the business of said company in manufacturing or selling nails or other products of steel or iron. It is evident that such company was not authorized, by the laws under which it was organized, to engage in the business of public warehouseman or to issue warehouse receipts.

It is insisted, however, by appellants, that as said company made a written application to the auditor of Hancock county and obtained a permit from him to carry on the business of public warehouseman under the provisions of section 8704, Burns' R. S. 1894 (6525, Horner's R. S. 1897), it was fully authorized, by said

The Franklin National Bank et al. v. Whitehead et al.

section, to carry on that business and issue warehouse receipts.

The section referred to is the first section of the public warehouse act of 1875, as amended in 1879, and the part relied upon by appellants is as follows: "Any person or incorporated company desiring to keep any such public warehouse shall be entitled to do so upon receiving a permit therefor from the auditor of the county in which such warehouse shall be kept." Section 8704, Burns' R. S. 1894. If appellants' construction of said section is the correct one, then all the corporations in the State, whether educational, charitable, religious, commercial, or otherwise, whatever may be the provisions of the law under which organized, are given the right of going into and carrying on the business of public warehousemen. While the language quoted from said section is very broad, it was certainly not the intention of the legislature to confer on all the corporations in the State, without regard to the law under which they were organized, and the purposes and objects of their organization, the privileges of public warehousemen. As well hold that persons without capacity to contract on account of infancy, insanity, or other disqualifications were, by said statute, authorized to engage in the business of public warehousemen and execute valid warehouse receipts.

A warehouseman is defined to be the owner of a warehouse; one who, as a business and for hire, keeps and stores the goods of others. (Black's Law Dictionary.) A person who receives goods and merchandise to be stored in his warehouse for hire. (Bouvier's Law Dictionary); 28 Am. and Eng. Ency. of Law, 636, 637; Edwards on Bailments, section 332; Hale on Bailments, 238.

Only such corporations as are authorized by the law under which they are organized to carry on the busi-

The Franklin National Bank et al. v. Whitehead et al.

ness of warehouseman can avail themselves of the provisions of said act of 1875 (Acts 1875, p. 172), as amended by the act of 1879 (Acts 1879, p. 230), being sections 8704, 8719, Burns' R. S. 1894 (6525, 6540, Horner's R. S. 1897). It follows that said nail company was not authorized to operate as a public warehouseman, or issue any warehouse receipts under the provision of said act of 1875, as amended by the act of 1879.

Appellants insist that, if the nail company could not become a public warehouseman, then its acts, as stated in the special finding, made it a private warehouseman, under the act of 1879, (Acts 1879, p. 231, sections 8720-8729, Burns' R. S. 1894, 6541-6550, Horner's R. S. 1897), and the receipts issued to appellants are sufficient, in equity, to carry out the intent of the nail company and appellants, by creating in appellants a lien upon the nails described in said receipts.

Section 8720 (6541), *supra*, provides that "Every person, firm, company or corporation, receiving cotton, tobacco, pork, grain, corn, rye, oats, wheat, hemp, whiskey, coal, any kind of produce, wares, merchandise, commodity, or any other kind or description of personal property or thing whatever, in store, or undertaking to receive or take care of the same, with or without compensation or reward therefor, shall be deemed and held to be a warehouseman." Said nail company was not authorized by the law under which it was organized to engage in the business of private warehouseman any more than it was authorized to carry on the business of public warehouseman, and the special finding shows that the said nail company never received any goods, wares, or merchandise or other property on store from any one, and that it was not engaged in business as a warehouseman and never had been, and did not operate a warehouse, and that

no receipts were ever issued by it, except to said appellants. It is clear from the finding that the nail company never in fact kept a warehouse to store goods in, and was not engaged in business as a public or private warehouseman, nor was it authorized to engage in such business. In *Sinsheimer v. Whitely*, 111 Cal. 378, 52 Am. St. 192, 43 Pac. 1109, the court said: "It is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have the power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. (*Shepardson v. Cary*, 29 Wis. 42; *Bucher v. Commonwealth*, 103 Pa. St. 534; *Edwards on Bailments*, section 332)."

In Minnesota, where the rule that a warehouseman can pledge his own goods in his warehouse to secure an indebtedness, by issuing a warehouse receipt to the pledgee, prevails, it is held that one who is not a warehouseman cannot give a valid warehouse receipt upon his own property, in his own possession, to secure his own debt. *National Exchange Bank of Hartford v. Wilder*, 34 Minn. 149, 155, 157, 24 N. W. 699; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244. In the case in 34 Minn. cited, the court said: "The owner of goods, if a warehouseman, can pledge the same by issuing and delivering his own warehouse receipt to the pledgee. * * * When the pledgor or the vendor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, although the actual physical possession is in himself."

In *Geilfuss v. Corrigan*, 95 Wis. 651, 37 L. R. A. 166, 70 N. W. 306, one Schleisinger owned two corporations,—one the Buffalo Mining Company, a mining corporation engaged in mining ore in Michigan; the other the Douglas Furnace Company, engaged in

The Franklin National Bank *et al.* v. Whitehead *et al.*

smelting ore in Pennsylvania; the furnace company had a large stock of pig iron constantly on hand in its yards in Pennsylvania. In order to raise money for the furnace company Schleisinger caused the furnace company to issue apparent storage receipts to the mining company, without consideration and without agreement to purchase, and without selection or delivery, and with the agreement that the receipts should be returned whenever the furnace company needed them on account of sales of iron. On receiving the receipts, he borrowed money of the plaintiff bank upon the notes of the mining company, secured by assignment of the receipts as collateral. The plaintiff bank took said receipts innocently, and without knowledge of any defect. The court said: "In order to be such [warehouse receipts] they must be issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation. * * * *Bucher v. Commonwealth*, 103 Pa. St. 528; *Shepardson v. Cary*, 29 Wis. 34. And the fact that the receipt was executed by a warehouseman must affirmatively appear in the evidence, *Shepardson v. Cary*, *supra*. Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bank bills constitutes the counterfeiter a bank. It seems that, had the receipts been negotiable warehouse receipts, the bank would have acquired a valid lien upon the iron they represented by the transfer and endorsement of the receipts to it by the Buffalo Mining Company. * * * But we may dismiss this question, because they were not

The Franklin National Bank *et al.* v. Whitehead *et al.*

such certificates, and the plaintiff obtains no advantage from the fact that they were in the usual form thereof. Nor were the certificates valid as chattel mortgages upon the iron named in them, not only because they are not chattel mortgages in legal effect, but also because by the law of Pennsylvania, as well as by the law of Wisconsin, a chattel mortgage is only valid as to third persons when filed in 'the proper office, and there is no claim of any filing here.'

The private warehouse act of this State (Acts 1879, p. 231, sections 8720-8729, Burns' R. S. 1894, 6541-6550, Horner's R. S. 1897), is substantially the same as the warehouse act of March 6, 1869, of the state of Kentucky, and was no doubt taken from that act. In *Mechanics' Trust Co. v. Dandridge* (Ky.), 37 S. W. 288, Dandridge gave a receipt purporting to be a warehouse receipt for property left in his possession, which receipt was pledged to Mason, Gooch & Hodge Company by its holder as collateral security for a debt, and the Kentucky court of appeals, in construing said statute, held that the same was not a warehouse receipt, and that Mason, Gooch & Hodge Company had no lien at all on the property. The court said: "The statute * * evidently refers to only such persons as in fact keep a warehouse to store goods in, and are engaged in that business. It cannot be that it was the intention of the legislature to provide that any one and all persons might become legal warehousemen by simply receiving one particular piece of property in store and issuing a receipt therefor. There is no pretense that Dandridge was engaged in keeping a warehouse and storing property therein as a business. It therefore follows that the receipt in question was and is invalid and ineffectual, and the indorsement thereof passed no interest in the property. It is, as a general rule, indispensable that possession must accom-

The Franklin National Bank et al. v. Whitehead et al.

pany a pledge of property in order to vest the pledgee with a title or interest therein. * * * It is therefore perfectly manifest that there was no change of possession, and nothing to warn the public of any change. * * * If appellee [Mason, Gooch & Hodge Company] desired to acquire a lien on the property, it could have done so by obtaining a mortgage, and then it would have been secure, and no other creditor need to have been misled. It is not necessary to discuss the question of notice, because appellees have no lien at all on the property, and it is wholly immaterial whether the appellant knew of the receipt or not."

It follows that even if the nail company was authorized by statute to engage in business as a private warehouseman, it not having done so, said receipts, even if they purported to be issued by it as a private warehouseman, would be invalid and ineffectual and would not create a lien on the property described therein. Besides, we do not think that the nail company had any power or authority to issue warehouse receipts upon its own property, in its own possession, and deliver the same as a pledge to secure an indebtedness, even if it was engaged in business as a public warehouseman and was fully authorized by the law to carry on such business. Such a receipt would not, in a technical sense, be a warehouse receipt, and even if between the parties it created a lien, as to which we need not and do not decide, it would be void as against all other persons, under section ten of the act for the prevention of frauds and perjuries, being section 6638, Burns' R. S. 1894 (4913, Horner's R. S. 1897), which provides that "No assignment of goods, by way of mortgage, shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage

The Franklin National Bank et al. v. Whitehead et al.

shall be acknowledged, as provided in case of deeds of conveyance; and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof." *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 474.

It may be true, as claimed by appellants, that a private warehouseman is authorized by section five of the act of 1879, p. 231, being section 8724, Burns' R. S. 1894 (6545, Horner's R. S. 1897), to issue warehouse receipts for his own property actually in store and under his control at the time of giving the receipt. The entire act, of which said section 8724 (6545), *supra*, forms a part, seems to have been taken from the statute of Kentucky, and the court of last resort in that state has held that said section authorizes a warehouseman to issue warehouse receipts upon his own property in the manner and under the conditions provided in said act. *Cochran v. Ripy*, 13 Bush. (Ky.) 495; *Ferguson v. Northern Bank*, 14 Bush. (Ky.) 555. If a private warehouseman has such authority in this State, it is by virtue of said section 8724 (6545), *supra*, and without said section he would have no such power. Jones on Pledges, section 325; Hale on Bailments and Carriers, p. 128. Said act, however, is distinct in form and purpose from the public warehouse act of 1875, as amended March 29, 1879, sections 8704-8719, Burns' R. S. 1894 (6525-6540, Horner's R. S. 1897), and said acts are entirely independent of each other. *Miller v. State*, 144 Ind. 401, 404. It is clear that said section does not authorize a public warehouseman to issue warehouse receipts on his own property, nor is there anything in the public warehouse act which authorizes it.

It follows that a public warehouseman would have no more power to issue a warehouse receipt upon his own property in his warehouse, as security for a debt,

The Franklin National Bank *et al.* v. Whitehead *et al.*

unless there was a statute expressly authorizing it, than would a debtor who is not a warehouseman. Where a debtor who is not a warehouseman issues a receipt purporting to be a warehouse receipt, on property in his possession and owned by him, for the sole purpose of securing a creditor, the same is not in any sense a warehouse receipt. *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147, 152, 153; *Mechanics Trust Co. v. Dandridge*, *supra*; *Sinsheimer v. Whitley*, *supra*; *Geilfuss v. Corrigan*, *supra*; *National Exchange Bank of Hartford v. Wilder*, *supra*; *Steaubli v. Blaine Nat'l Bank*, 11 Wash. 426, 39 Pac. 814; *Thorne v. First Nat'l Bank*, 37 Ohio St. 254; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 164, 27 N. E. 24; Jones on Pledges, sections 325, 326.

In *Union Trust Co. v. Trumbull*, *supra*, T. W. Hall & Company, merchants and factors in wool, issued a receipt for their own wool in their own possession to one Vehmeyer, as security for money borrowed from him, and the court held that he was not entitled to a lien on the wool described in said receipts. The court on p. 164, said: "His claim is based on a receipt issued by Hall & Co., who were not public warehousemen, and which was therefore of no more effect as a lien than a certificate issued by any other property owner. It is only where property is stored in a *public* warehouse that a receipt may be given which will evidence a lien upon the property."

In *Thorne v. First Nat'l Bank*, *supra*, it was held that an instrument, substantially like a warehouse receipt, issued to a creditor by a debtor, who was not a warehouseman, on his own property, for the sole purpose of securing the creditor, was void as against other creditors, when the property remained in the possession of the debtor, for the reason that it was an attempt to create a lien upon personal property con-

trary to the provisions of the statute making chattel mortgages void if not accompanied by delivery of possession unless the mortgage, or a copy thereof, was deposited in the office of the officer named in the statute.

It is insisted, however, by appellants that the nail company is estopped from denying that it was a warehouseman, and that it held as such the nails mentioned in the receipts, for and subject to their order. We do not think the nail company was estopped as claimed by appellants. It is true, as urged by appellants, that when a person is carrying on the business of warehousemen, public or private, under our statutes, and he issues warehouse receipts which comply with the requirements of the statutes under which he is operating his warehouse, and the person to whom said receipts have been issued indorses the same to innocent holders for value, that the warehouseman is estopped from denying that he holds the goods described on the terms specified in the receipts; but this rule has no application here for the reason that it is not shown by the special finding that the nail company is a public or private warehouseman, or that it was engaged in such business or had any power to do so, or that said receipts have been indorsed to an innocent holder, but the special finding shows that said company was not a warehouseman, public or private, and never had been, and had no power to engage in such business or issue warehouse receipts. The rule is that, to constitute a valid estoppel by conduct, there must be knowledge on the part of the person to be estopped, and a want of knowledge on the part of the party relying on the estoppel, and there can be no estoppel when there is notice or knowledge on the part of the person relying upon the estoppel.

The Franklin National Bank *et al.* v. Whitehead *et al.*

First Nat'l Bank v. Williams, 126 Ind. 423, 429, 430; *Buck v. Milford*, 90 Ind. 291, 293, and cases cited; *Stewart v. Beck*, 90 Ind. 458. If the nail company could be estopped as insisted by appellants, it would only be, if at all, when appellants had no notice or knowledge that the nail company was not a warehouseman, and was not engaged in such business, and had no power to engage in such business or issue warehouse receipts, but believed in good faith that it was engaged in such business, and had the power to do so and issue warehouse receipts, and that, relying upon such facts, they accepted the receipts and made the loan on the faith thereof. To sustain the estoppel claimed by appellants against the nail company, the facts necessary to constitute the same must be clearly stated in the special finding, leaving nothing to intendment. *First National Bank v. Williams*, *supra*. No such facts are stated in the special finding, but, on the contrary, so far as the special finding shows, appellants knew that the nail company was engaged in the manufacture of nails, and that it was organized under the laws for the incorporation of manufacturing and mining companies, and was not a warehouseman public or private, and never had been, and was not authorized to carry on such business or issue such receipts. Besides, they were bound to know that, under our statutes, a corporation, organized under the law for the incorporation of manufacturing and mining companies, had no power to carry on either a public or private warehouse, or issue warehouse receipts; and that a public warehouseman had no authority to issue warehouse receipts on his own property in his public warehouse, as a security for his own debts or the debts of others.

It is insisted by appellants that if the nail company was not authorized to be a public warehouseman, and

had no right to issue public warehouse receipts on its own property to secure its own debts, its acts in doing so were merely *ultra vires*, and as such contracts have been performed by appellants in loaning said nail company the money, that after receiving the benefits of the contract, it cannot avoid such warehouse receipts on the ground that it has exceeded its corporate powers in issuing them. There is much conflict in the decisions of courts of last resort as to the doctrine urged, but in the jurisdictions where it prevails the rule is that when a corporation enters into a contract, merely beyond its powers, which, if made by a private person, would have been binding upon him, and such contract has been performed by the other party thereto, the corporation will not be permitted to deny its power to make such contract, but the same may be enforced against it. It would seem that what we have already said in regard to the nail company being estopped to deny that it was a warehouseman, and had the power to issue said receipts and hold said nails for appellants, is a sufficient answer to this contention of appellants, but we think there are also other reasons why such contention cannot prevail. But, as we have shown, a public warehouseman, whether a corporation or an individual, cannot issue a public warehouse receipt on his own property, in such warehouse, as security for his own debts or the debts of others, and such receipt, if issued, creates no lien on such property. The rule urged cannot, therefore, apply to this case, even if it were conceded that the nail company was authorized by law to engage in the business of public warehouseman, and was actually engaged in such business. Besides, the doctrine urged does not apply to contracts where the same are forbidden by statute or are contrary to public policy. *State Board of Agriculture v. Citizens' Street R. W.*

The Franklin National Bank *et al.* v. Whitehead *et al.*

Co., 47 Ind. 407, 411; 27 Am. and Eng. Ency. of Law, 378. As we have shown, any attempt by any person to create a lien on his personal property, except in the manner provided in section ten of the statutes for the prevention of frauds and perjuries, is void, and if by an assignment by way of mortgage, the same, unless recorded within ten days after its execution, is void as to all persons except the parties thereto. As there was no law authorizing the nail company to issue said receipts, and thus create a lien on said personal property, the creation of a lien in that manner is expressly forbidden by section ten of the act for the prevention of frauds and perjuries, being section 6638 (4913), *supra*. *Saint Joseph Hydraulic Co. v. Wilson*, *supra*, p. 474.

It is clear that the only interest appellants can claim in said nails under said receipts is that of a lien thereon as pledgees. To make a valid pledge there must have been either an actual or constructive delivery of the property described in the receipts. Good faith does not make good a pledge unless there has been a delivery and possession, either actual or constructive. The special finding shows that there was no actual delivery when the receipts were executed. There was no delivery unless the delivery of the receipts to appellants was a constructive delivery. If the nail company had been a warehouseman, and authorized to issue said receipts, upon its own property, and they had in all respects conformed to the requirements of our statutes, the delivery thereof, as collateral security to secure said loans, might have been sufficient constructive delivery. But this rule, as we have shown, does not apply to property in the possession of the pledgor, who is not a warehouseman, and in such case the delivery of the receipts is not a constructive delivery of the property described

in the receipts. *Shepardson v. Cary, supra; Geilfuss v. Corrigan, supra.* The setting apart of the nails described in the receipt to the appellant, the Franklin National Bank, just before the appointment of a receiver, was without the knowledge of said bank, and was not a delivery to said bank, nor did said bank then or at any time take or have possession of said nails. As there was no actual or constructive delivery of the nails to appellants, and they never had actual or constructive possession thereof, they had no lien thereon as pledgees. There is no mode, under the law of this State, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property, retaining its possession, can give another a lien upon it, that can be enforced against any person except the parties thereto. *Saint Joseph Hydraulic Co. v. Wilson, supra*, p. 474. There having been no delivery of possession, actual or constructive, of said property, said receipts, even if valid as to the nail company and appellants, were void as to third parties, under section ten of the act for the prevention of frauds and perjuries, being section 6638 (4913), *supra*. It will be observed that under said section an assignment or mortgage of goods as security is only valid as to the parties thereto, and is void as to all other persons, while in many of the other states it is only void as to creditors and purchasers for value without notice.

In *Saint Joseph Hydraulic Co. v. Wilson, supra*, p. 474, this court, in speaking of equitable and other liens where there was no delivery and retention of possession of the property upon which the lien was claimed said: "But in each there is that feature of an 'assignment of goods' which 'as against any other person than the parties' renders it invalid under our statutes, unless acknowledged and recorded. The

The Franklin National Bank et al. v. Whitehead et al.

cases of *Kennedy v. Shaw*, 38 Ind. 474; *Lockwood v. Slevin*, 26 Ind. 124; *Ross v. Menefee*, 125 Ind. 432; *Scarry v. Bennett*, 2 Ind. App. 167; Boone on Mortgages, section 253, notes 14, 15, establish the invalidity of such an 'assignment of goods,' even as to third persons with actual notice of the lien. This court held in *Granger v. Adams*, 90 Ind. 87, that one who asserts a right under such an instrument, paramount to the claims of creditors, must show that all has been done which the statute requires." Under said section, therefore, an assignment of goods by way of mortgage, if not recorded within ten days after its execution, is void as against a subsequent purchaser, even though he had actual notice thereof. *Ross v. Menefee*, *supra*; *Saint Joseph Hydraulic Co. v. Wilson*, *supra*, 474, 475; *Stengel v. Boyce*, 143 Ind. 642, 646, and cases cited; *Granger v. Adams*, 90 Ind. 87; *Kennedy v. Shaw*, 38 Ind. 474. Such an assignment of goods is also void as against an assignee under a voluntary assignment for the benefit of creditors, and it is his duty to take advantage of the failure to record the same in ten days after its execution. *Lockwood v. Slevin*, *supra*, 125, 128; *Saint Joseph Hydraulic Co. v. Wilson*, *supra*, p. 474; *Hanes v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 42 Ohio St. 295; *Thorne v. First Nat'l Bank*, *supra*; *Bingham v. Jordan*, 1 Allen 373, 79 Am. Dec. 748; *Adams v. Merchants National Bank*, 9 Biss. 396, 403; 2 Cobbey on Chat. Mort., section 619; Jones on Chat. Mort., section 314, and cases cited. The assignee is regarded as representing and standing in the place of the creditors, as well as the assignor, and he therefore has the right to contest claims and the rights to property which the assignor did not possess. *Lockwood v. Slevin*, *supra*; *Voorhees v. Carpenter*, 127 Ind. 300, 301, and cases cited; *Cooper v. Perdue*, 114 Ind. 207; *Seibert v. Milligan*, 110 Ind.

106; *Hasseld v. Seyfort*, 105 Ind. 534; *Adams v. Merchants' Nat'l Bank*, *supra*, p. 403. The assignment is made for the benefit of creditors, and the assignee holds the property in trust for them, and as such he can enforce any right and reach any property that a general creditor could enforce either before or after obtaining judgment and execution, in case there had been no assignment. *Lockwood v. Slevin*, *supra*; *Kilbourne v. Fay*, 29 Ohio St. 264, 278, 279; *Hanes v. Tiffany*, *supra*; *Adams v. Merchants Nat'l Bank*, *supra*.

It is clear from the language of section 6638 (4913), *supra*, that as such trustee for the creditors he is not a party to any assignment of personal property by way of mortgage made by the assignor, within the meaning of said section. If an unrecorded assignment of goods, by way of mortgage, is void as against an assignee for the benefit of creditors, for the same reason it is also void as against a receiver of an insolvent corporation.

When a court has taken possession of the property of an insolvent corporation for administration, and appointed a receiver, the property of the corporation is a trust fund for the payment of its debts. *First Nat'l Bank v. Dovetail, etc., Co.*, 143 Ind. 534, 542, 543, and cases cited; *First Nat'l Bank v. Dovetail, etc., Co.*, 143 Ind. 550, 553, 554; *Henderson v. Indiana Trust Co.*, 143 Ind. 561; *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571. And a general creditor has a lien upon such property, and therefore has the right to intervene and contest the validity as well as the priority of other claims or asserted liens. *Farmers Loan and Trust Co. v. San Diego St. Car Co.*, 45 Fed. 518, 520; *Richardson's Exr. v. Green*, 133 U. S. 30, 44; 2 Cook on Stock and Stockholders, section 788, p. 1272, and notes 1 and 2. Such receiver represents the

The Franklin National Bank et al. v. Whitehead et al.

creditors as well as the stockholders and holds the property for the benefit of both. He is the trustee for both, and, as trustee for the creditors, can maintain and defend actions which the corporation could not. *Nat'l State Bank v. Vigo County Nat'l Bank*, 141 Ind. 352, 356, and authorities cited; *Graham Button Co. v. Spielmann*, *supra*; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 21 Atl. 298; *Farmers Loan, etc., Co. v. Minneapolis, etc., Engine Works*, 35 Minn. 343, 29 N. W. 349; 5 Thompson on Corp., sections 6945, 6946, 6952; Gluck & Becker on Receivers of Corp., p. 168; Beach on Receivers (Alderson's ed.), sections 298, 455. As trustee representing the creditors of an insolvent corporation, he is not, therefore, a party to an assignment of goods made by the corporation to secure an indebtedness, within the meaning of section 6638 (4913), *supra*. As such trustee, representing the creditors, he may avoid an assignment of goods by way of a mortgage made by the corporation, on the grounds that it was not recorded within the time required by law. *Farmers Loan, etc., Co. v. Minneapolis, etc., Engine Works*, *supra*; *Rudd v. Robinson*, 61 Hun. 339, 346-348, 7 N. Y. Supp. 535; *Graham Button Co. v. Spielmann*, *supra*; *Hopper v. Lovejoy*, *supra*; Gluck & Becker on Receivers of Corp., p. 168; Beach on Receivers (Alderson's ed.), p. 726; 5 Thompson on Corp., section 6952.

It is clear, therefore, even, if said receipts created a lien on said nails as against the nail company that they were void as to the general creditors and the receiver as trustee for them, and that the general creditors could reach the same through the receiver and by intervening petitions, the same as the general creditor could have done after levying writs of attachment thereon, or after obtaining judgment and execution, if there had been no receivership. Appellees claim

Hart v. The State.

that, as the receipts did not state any distinguishing marks, that they were invalid.

The public warehouse law requires that "all warehouse receipts for property stored in public warehouses of Class B shall distinctly state on their face the brand or distinguishing mark on such property." Such receipts must so describe the property that it can be identified by such description from other property of like kind. The private warehouse law contains a like requirement. The view we have taken of this case renders it unnecessary for us to determine whether or not the description of the property contained in the receipts complied with the law.

We have read the evidence, and the same sustains the finding of the trial court. It follows, from what we have said that the court did not err in its conclusions of law, nor in overruling the motion for a new trial.

Judgment affirmed.

HART v. THE STATE.

[No. 18,488. Filed February 24, 1898.]

CRIMINAL LAW.—*When Erroneous Instruction is Harmless.*—Where a defendant was indicted both for larceny and burglary in separate counts of the same indictment, an erroneous instruction to the jury as to the charge of larceny is not available for the reversal of a judgment finding the defendant guilty of burglary only.

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From the Noble Circuit Court. *Affirmed.*

H. C. Peterson and *E. G. Cook*, for appellant.

W. A. Ketcham, Attorney-General, *Merrill Moores*, *A. E. Dickey*, and *W. M. Aydelotte*, for State.

MCCABE, J.—The appellant and two others were indicted in the court below in seven counts, six of them charging the defendants with burglary, and the

Hart v. The State.

other charging them with larceny. On a trial by a jury, they were found guilty of burglary, and judgment was rendered accordingly, over appellant's motion for a new trial. The appellant only appeals.

Overruling appellant's motion for a new trial is assigned as the only error complained of; and the only error alleged in the motion for a new trial that is urged for a reversal is the following instruction, given by the court to the jury: "If you find from the evidence beyond a reasonable doubt that the goods described in the indictment, or a portion of them, were stolen, and that such stolen property was found in the exclusive possession of the defendants, within a short time after the larceny was perpetrated, such possession imposes on the defendants the duty and burden of explaining their possession of said goods; and if they have failed to satisfactorily account as to how they came by the stolen property, or have given a false account of how they came into possession of such stolen property, the law presumes that the defendants stole such property, and this presumption is strong enough to justify you in finding them guilty."

The objection to this instruction is that the jury are told by it that the presumption arising from the facts enumerated therein is a presumption of law, whereas the appellant contends that it is a presumption of fact simply; and the learned counsel for the appellant goes into a lengthy and interesting argument in support of that contention. The Attorney-General, on behalf of the State, goes into an equally interesting argument that the instruction is a correct enunciation of the law. But we are of the opinion that the question is not before us, and hence we ought not, and do not, decide it.

The instruction had reference to appellant's guilt of larceny alone, and had no reference to his guilt of

Holmes v. McPheeters, Administrator.

burglary. Because it says, if the facts enumerated be found to be true beyond a reasonable doubt, "the law presumes that the defendants stole such property, and this presumption is strong enough to justify you in finding them guilty." But they were not found guilty of larceny, and hence the instruction, no matter how erroneous it was, did not harm the appellant. Larceny and stealing goods were no part of the crime of burglary of which appellant was found guilty. Section 2002, Burns' R. S. 1894 (1929, R. S. 1881). The jury were fully and correctly instructed as to what it takes to constitute burglary as well as larceny.

The giving of an erroneous instruction even is not available for the reversal of the judgment in a criminal case, where it appears that the substantial rights of the defendant were not prejudiced thereby. *Stewart v. State*, 111 Ind. 554. The substantial rights of appellant were not prejudiced by the instruction as to larceny even if erroneous, because he was acquitted as to the charge of larceny, and found guilty of burglary.

The judgment is affirmed.

HOLMES v. MCPHEETERS, ADMINISTRATOR.

[18,515. Filed February 24, 1898].

LIMITATION OF ACTIONS.—*Descent and Distribution.—Debt Due Estate by Heir Not Barred by Statute of Limitation.*—The statute of limitation cannot be interposed by an heir as a defense to an application by the administrator to apply a portion of his distributive share of such estate to the payment of a note of such heir in favor of the estate.

From the Washington Circuit Court. *Affirmed.*

F. M. Hostetter, for appellant.

Alsbaugh & Lawler, for appellee.

JORDAN, J.—This was an application to the court by the administrator to enforce his equitable right to

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Holmes v. McPheeters, Administrator.

retain a certain portion of the distributive share of the appellant, in his hands, and apply it to the payment of a debt which appellant owed the estate. The substance of the material facts averred in the third paragraph of the complaint, which finally constituted the complaint on which this suit was tried and determined, is as follows: Hugh A. Holmes died intestate at Washington county, Indiana, on December 31, 1893, leaving surviving him appellant, his brother, together with other brothers and sisters, as his only heirs at law. Appellee was duly appointed administrator of the estate of the deceased, who, at the time of his death, was the owner of personal property of the value of \$2,500.00, which came into the hands of said administrator, and also of real estate situated in the State of Indiana, which realty seems to have been sold and converted into money, which was also in the hands of the administrator, for distribution among said heirs. That of the funds belonging to the estate appellant's share on final distribution would be \$500.00 and over. Among the assets of the estate was a promissory note of \$160.00, executed by appellant to the decedent on the 18th of May, 1885, due one day after said date, bearing interest at six per cent., which is still due to the said estate, and unpaid. After appellee was appointed administrator, and before an action to recover a judgment on the note had been barred by the statute of limitations, he presented the note to appellant for payment, and the latter orally agreed that he would accept it in part payment of his share, on final distribution of the funds of the estate. It is further alleged that the plaintiff, as administrator, is ready to make a final settlement of his trust, and that defendant repudiates his agreement, and refuses to allow the amount due to the estate on the note to be deducted from his distributive share, and threatens to inter-

Holmes v. McPheeters, Administrator.

pose the statute of limitations as a defense in the event a suit to recover a judgment on the note is instituted. The complaint closes with a prayer, among other things, to the effect that the court by its order and decree, authorize and empower the plaintiff to withhold from the defendant's share of the funds in his hands belonging to the estate a sum equal to the amount due the estate on the note, and for all other and proper relief.

At the time this suit was commenced the statute of limitations had fully run against the note. Appellant unsuccessfully demurred to the complaint, and an answer was then filed, the first paragraph being the general denial, and the second set up the limitation of ten years as a defense to the action. This was the only defense or claim interposed to defeat the action. To this plea a demurrer was sustained. A trial resulted in the court ordering and decreeing that the defendant accept the amount of the note, principal and interest, due on the first day of September, 1894, and that the same be deducted from his distributive share of the estate.

The appellant in his assignment of errors, complains of the court in overruling his demurrer to the complaint and in sustaining appellee's demurrer to his plea of the statute of limitations.

Counsel for appellant says that his client might, by his oral agreement, have authorized the administrator to have deducted the amount of his note from his share, provided the agreement had been carried into effect at the time it was made by deducting the amount from his share, and surrendering the note for cancellation. But his insistence is that the oral agreement, which, as is contended, is the only foundation on which this action can rest, is invalid and can not be enforced for several alleged reasons, and as a

Holmes v. McPheeters, Administrator.

recovery on the note was barred by our statute of limitations at the beginning of this suit, he insists that the right, as claimed by the administrator, to retain and apply a part of appellant's distributive share in payment and satisfaction of the debt, cannot be sustained over the defense of the statute of limitation interposed by the answer, and consequently the judgment is wrong.

We do not stop to consider the objection urged by appellant against the oral agreement, for the reason that we do not view it as a controlling factor in this case. The administrator's right to retain and apply, so far as necessary, the appellant's share of the funds in his hands to the payment and satisfaction of the debt which the latter owed the estate, did not depend on any agreement to that effect on the part of appellant. The law invested the administrator with that right independently of any agreement or contract. The doctrine is correctly and firmly settled in this State that a distributee is not entitled to receive his distributive share while he is indebted to the estate, and thereby retains in his own hands a part of the fund out of which his own and the shares of other distributees, or other claims on such fund, ought to be paid. *Fiscus v. Moore*, 121 Ind. 547; *Koons v. Mellet*, 121 Ind. 585; *Fiscus v. Fiscus*, 127 Ind. 283.

This right is not one of set-off, but is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee or legatee, until the latter has discharged the obligation which he owes to the estate. The heir or legatee, as the authorities affirm, is not, in accordance with justice or good conscience, entitled to be awarded and receive his share as long as he is a debtor to the estate, and thereby has in his own hands a part of the fund upon which the payment of his own share and the

shares of others depend. To allow a distributee to receive his share of the fund in the hands of the administrator for distribution, while the former is in default in the payment and discharge of his own obligations to the estate, would serve to diminish the fund, and result, perhaps, to the prejudice of others. By permitting the distributee to receive his share, while he retains a part of the fund in his own hands, out of which his share ought to be paid, might and frequently would, result in awarding to him a portion of the fund greater than that received by other equally entitled distributees. These principles, in reason, do and must apply when the recovery of the debt which the distributee owes to the estate is barred by the statute of limitation. The statute of limitation is one of repose, and is only a bar to the remedy, and not to the debt itself, simply leaving it unpaid without any legal remedy on the part of the creditor to enforce its payment by suit, in the event the debtor relies on the statute as a defense. Measured, however, by a moral standard, and one in accord with good conscience, the debtor is still under an obligation to pay his debt, although a recovery thereon under the law may be barred by the lapse of time. The statutes of this State recognize the right of a party to enforce a set-off against a cause of action, although a recovery upon the debt upon which the set-off is based is barred by limitation. Section 370, Burns' R. S. 1894 (367, R. S. 1881).

It must follow, in our judgment, that the statute of limitation could not be successfully interposed by appellant as a defense to defeat the appellee in his equitable right to apply an amount sufficient of the appellant's share of the estate in his hands in payment of the note. It was held in *Fiscus v. Fiscus*, *supra*. that a distributee could not defeat the administrator

Starr, Treasurer, v. The State, ex rel. Ketcham, Attorney-General.

in the exercise of this right by claiming, as a householder, his distributive share as exempt under the exemption statute of this State. The following authorities support the conclusion reached, and the rule which we affirm. *Rogers v. Murdock*, 45 Hun. 30; *Tinkham, v. Smith*, 56 Vt. 187; *Smith v. Kearney*, 2 Barb. Ch. 533; *Wilson v. Kelly*, 16 S. C. 216; *Higgins v. Scott*, 2 Barn. & Adol. 413; *Jeffs v. Wood*, 2 P. Williams 128; 1 Thornton & Blackledge Administration and Settlement, pp. 507 and 508.

The court did not err in overruling the demurrer to the complaint, nor in sustaining it to the answer setting up the statute of limitation.

Judgment affirmed.

**STARR, TREASURER, v. THE STATE, EX REL. KETCHAM,
ATTORNEY-GENERAL.**

[No. 17,838. Filed February 25, 1898.]

APPEAL.—Bill of Exceptions.—A bill of exceptions must be signed by the judge before it is filed with the clerk. p. 593.

STATUTE.—Repeal of, Pending Action Based Thereon.—A proceeding for the issue of a writ of mandate to require the treasurer of a city school board to pay over to the county treasurer a balance of unexpended school revenue, as provided by section 5969, Burns' R. S. 1894, was not affected by the enactment, after the suit was begun, of the act of March 7, 1895 (Acts 1895, p. 153), repealing the former statute and providing another mode for the enforcement of the liability. pp. 593-595.

PARTIES.—Action to Require Treasurer of City School Board to Pay Over Unexpended Balance of School Revenue.—In an action to require the treasurer of a city school board to pay over to the county treasurer an unexpended balance of school revenue, as provided by section 5969, Burns' R. S. 1894, it is not necessary to include with the treasurer the other members of the school board. p. 595.

From the Wayne Circuit Court. *Affirmed.*

J. F. Kibbey, J. F. Robbins and H. C. Fox, for appellant.

Starr, Treasurer, v. The State, ex rel. Ketcham, Attorney-General.

W. A. Ketcham, Attorney-General, and Thomas J. Study, for appellee.

HOWARD, C. J.—This was a proceeding on the part of the Attorney-General for the issue of a writ of mandate to require the treasurer of the school city of Richmond to pay over to the treasurer of Wayne county a balance of \$9,983.51, of unexpended school tuition revenue left in his hands for the school year ending the day previous to the first Monday of July, 1893, under provisions of the act approved March 3, 1893, Acts 1893, p. 195, section 5969, Burns' R. S. 1894. A demurrer to the application and alternative writ issued thereunder being overruled, a general denial was filed, and the cause was submitted to the court for trial. The facts were found specially, followed by conclusions of law and judgment in favor of appellee.

So far as the merits of the case are concerned, the issues raised were decided against the contentions of appellant, in the case of *State v. McClelland*, 138 Ind. 395, and, later, in the case of *Pfau v. State*, 148 Ind. 539. In addition, it is to be said that, so far as concerns questions requiring a consideration of the evidence, there is nothing before the court, since what purports to be a bill of exceptions is no part of the record. It is shown that the paper called a "bill of exceptions" was presented to the judge and filed December 7, 1895; but this paper did not become a bill of exceptions until it was signed by the judge, December 14, 1895, and, as it was not filed after being so signed by the judge, it is no part of the record, and hence cannot be considered. *Guirl v. Gillett*, 124 Ind. 501; *Ayres v. Armstrong*, 142 Ind. 263; *Makepeace v. Bronnenberg*, 146 Ind. 243.

Starr, Treasurer, v. The State, ex rel. Ketcham, Attorney-General.

The action was begun September 15, 1894, under provisions of the act of 1893, *supra*, then in force, and final judgment was rendered October 11, 1895. As the act of 1893 was amended by the act approved March 7, 1895 (Acts 1895, p. 153), which latter act repealed all laws in conflict therewith, and did not contain any clause saving pending litigation, it is contended that the demurrer to the application and alternative writ, filed September 5, 1895, should have been sustained.

This contention, doubtless, should prevail were it not for the provisions of sections 243, 248, Burns' R. S. 1894. The first of these sections reads: "No rights vested, or suits instituted, under existing laws shall be affected by the repeal thereof, but all such rights may be asserted, and such suits prosecuted, as if such laws had not been repealed. And in section 248 it is provided that, "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and the statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Following the rulings in *State v. McClelland* and *Pfau v. State*, *supra*, it cannot be denied that, under the act of 1893, the treasurer of the school city had incurred a liability to the State for his failure to turn over to the county treasurer the unexpended balance of funds in his hands. The act of 1895 did not provide for any release or extinguishment of this liability. On the contrary, the act of 1895 itself recognized the liability, and provided another mode for its future enforcement. The suit already instituted might therefore be prosecuted quite the same as if the

Starr, Treasurer, v. The State, ex rel. Ketcham, Attorney-General.

act of 1893 had not been repealed. It would be intolerable that the treasurer, for the reason given, should retain in his hands the money that confessedly belongs to the State. *State v. Helms*, 136 Ind. 122; *State v. Halter, ante*, 292; *Bruce v. Cook*, 136 Ind. 214. In the latter case it was expressly held that where a statute under which a liability has accrued has been repealed, and the repealing act does not provide for the extinguishment of such liability, the statute repealed will be treated as still remaining in force for the purpose of sustaining any proper action for the enforcement of such liability.

Another reason urged in support of the demurrer is that there is a defect of parties, inasmuch as the other members of the school board are not included with the treasurer. The statute, however, expressly confined the liability to the treasurer. It was competent for the legislature to do this. The treasurer could not ignore the positive command of the law by reason of any action or failure to act on the part of the board. His duty was plainly pointed out by the statute.

The right to proceed in the case at bar by writ of mandate, and other questions discussed by counsel, have all, as we think, been sufficiently considered in the cases above cited, *State v. McClelland* and *Pfau v. State, supra*.

Judgment affirmed.

THE CITY OF BLOOMINGTON v. PHELPS ET AL.

[No. 18,070. Filed February 25, 1898.]

APPEAL AND ERROR.—*Transcript.*—The trial court is the custodian of its own files, and when a transcript properly certifies a pleading to the Supreme Court, it must be accepted as conclusive, until the appellate tribunal is advised that the clerk will change his certificate, or that the lower court has, by some proper action, made the record or files below disclose a condition differing from that disclosed by the transcript. *p. 597.*

MUNICIPAL CORPORATION.—*Street Improvements.*—*Collateral Attack.*—*Proof of Publication.*—*Statute Construed.*—An assessment for street improvements cannot be collaterally attacked, because the municipality failed to make a matter of record the proof of publication as required by section 481, Burns' R. S. 1894. *pp. 598-600.*

SAME.—*Common Council.*—*Notice.*—*Assumption of Jurisdiction.*—A common council acting upon a notice is an adjudication of its sufficiency, without a formal entry upon the question of notice. *p. 599.*

SAME.—*Contract for Street Improvements.*—*Best Bidder.*—*Estoppel.*—After street improvements have been completed, and the benefits thereof have been received, a property owner cannot object to an assessment because the contract for such improvements was let to one whose bid was slightly higher than the bid of another. *pp. 600, 601.*

From the Monroe Circuit Court. *Reversed.*

H. C. Duncan and I. C. Batman, for appellant.

Louden & Louden, for appellee.

HACKNEY, J.—The transcript in this case discloses the loss of the original complaint, as filed by the appellant, and the filing of a substituted complaint by permission of the trial court, which substituted complaint is embodied in and identified by the transcript, at the point where such permission was given.

The appellees, upon affidavits and motion in this court, sought a writ of *certiorari* to correct the record, upon the alleged ground that the substituted complaint so copied in the transcript was not properly of

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The City of Bloomington v. Phelps *et al.*

the files of the lower court in the cause. The writ was granted, that the clerk might, if he chose to do so, correct his certificate, but this he did not do. We are now asked, upon affidavits and counter affidavits filed by the parties, to disregard that part of the transcript designated as the "substituted complaint."

This we cannot do. The remedy upon a question of the identity of the pleadings in a cause, is to be had only in the trial court; and, when a transcript filed in this court properly identifies a pleading as a part of the record, we are bound by it. Any other rule, as must be apparent, would lead to hopeless confusion in the settlement of controverted questions of the identity of parts of the record. The trial court is always possessed of better knowledge and more direct information of its files and proceedings than this court can be, and such disputes as that here sought to be made relates to the files of the lower court, and not to those of this court. That court is the custodian of its own files, and, when a transcript properly certifies a pleading to this court, it must be accepted as conclusive until we are advised that the clerk will change his certificate, or that the lower court has, by some proper action, made the record or files below disclose a condition differing from that disclosed by the transcript.

The principal question in the case is as to the priority of an alleged lien for street improvements, made under the Barrett Law, section 4288, *et seq.*, Burns' R. S. 1894, and a mortgage alleged to have been executed by the property owner to the appellees before any of the proceedings for the improvement. This question arises upon special findings of facts and conclusions of law stated by the trial court. The findings give in detail the proceedings of the city, a part of which only are in dispute.

As we understand the appellee's learned counsel, it

The City of Bloomington v. Phelps et al.

is not objected that the notices required by the statute were not given, but it is claimed that no proof of the publications required was ever made. It is expressly found that the common council passed a resolution of the necessity of the improvement, by a particular method and within given limits, and fixed a day and hour for hearing objections to the making of such improvements; that thereafter, and before the day so fixed, two weeks' notice was given by a publication in a newspaper, whose circulation and name are stated, which notice gave the time and place of such hearing, but that the record of the proceedings do not show that proof of notice was made. It is further found that, at a time subsequent to the date fixed for such hearing, the common council adopted an ordinance, by a two-thirds vote, for the construction of said improvement according to the plans and specifications adopted therefor, and which said ordinance was published for three weeks in a newspaper, of name and circulation stated, but that the records of the proceedings do not show that proof of such publication was made; that advertisement for bids was made for three weeks, etc., but that the record of the proceedings does not disclose that proof of publication thereof was made.

It is insisted for the appellees that by section 481, Burns' R. S. 1894, proof of publication, in such proceedings, is required, and that in the absence thereof the proceedings are without jurisdiction, and consequently void.

That proceedings without jurisdiction are ordinarily of no validity may be conceded, but that the failure of the record to affirmatively disclose the proof of publication defeats jurisdiction, or that the statute last cited requires proof of publication, are propositions not so readily conceded. That provision of the

The City of Bloomington v. Phelps et al.

statute, a part of the civil code, is as to the manner in which proof of publication may be made, and is not a requirement that proof shall be made only in that manner. The finding of the court is not that proof, by the method provided in that statute or otherwise, was not made, but it is that no record was made of any such proof. No statute has been cited as requiring such record, and it has been uniformly held that a tribunal such as the common council or county board, acting upon notice is an adjudication of its sufficiency, without a formal entry upon the question of notice. *Taber v. Ferguson*, 109 Ind. 227; *Updegraff v. Palmer*, 107 Ind. 181; *Jackson v. State*, 103 Ind. 250; *Cauldwell v. Curry*, 93 Ind. 363; *Board, etc., v. Hall*, 70 Ind. 469.

The method of attack upon the assessment in question is collateral, and in such attacks all reasonable presumptions in favor of jurisdiction are indulged. Here we have notices, confessedly such as the law required. The failure to enter the proof of such notices did not diminish the force of the notices to bring to the common council jurisdiction over the person of those interested. Jurisdiction of the subject-matter is conceded. The notice having given jurisdiction of the person, it was not lost by the mere irregularity, if an irregularity, in not entering of record the proof of notice. "It seems to be settled * * * that in matters of local improvement where jurisdiction over the whole subject is conferred upon a municipal corporation, with power to make local assessments for that purpose, any failure to comply strictly with any statutory requirement, not affecting the jurisdiction, will be regarded as a mere irregularity, and in a collateral proceeding will be disregarded." *Barber, etc., Co. v. Edgerton*, 125 Ind. 455, and see authorities there cited. See, also, *McEneney v. Town of Sullivan*, 125 Ind. 407.

The City of Bloomington v. Phelps et al.

The failure to enter of record the proof of notice is not, in our opinion, a failure in respect to jurisdiction, and is not, therefore, a question for collateral attack.

One further question arises, upon the finding "That the records of said common council show that said bids were referred to George Champ, city civil engineer, and that he reported that the bid of John S. Rogers would amount to about \$42.00 more than the bid of Alva Dobson, but on account of Mr. Rogers being the contractor on the east end of said street, and the peculiar surroundings of the work, it would cost less money at Mr. Rogers' bid, notwithstanding it was \$42.00 more on the price of the bid."

Under that provision of the statute requiring the contract to be let to the "best bidder," section 4288, Burns' R. S. 1894, it is insisted that the above finding requires the conclusion that the letting to Mr. Rogers was void. Limitations of this character upon the power of municipal officers are found in most of the grants of power to them. Some restrict the letting to the "lowest bidder," some to the "lowest responsible bidder," and some to the "best bidder." There can be no doubt that the primary purpose of these provisions is to prevent the arbitrary letting of public contracts to favored bidders, regardless of the welfare of those to be charged with the cost of the improvement. Nor can there be any doubt that the municipal officers should observe their duty in this respect. To what extent the varying forms in which the limitation is expressed may be held to vest discretion in them and call for the exercise of a sound judgment, or when the limitation may be regarded as mandatory, we do not now determine. Here the slight difference in the bids suggests no fraudulent purpose, and the appellees, even if they had ever had the power to restrain the execution of the contract, or the performance of the work

Chandler et al. v. The Citizens National Bank of Evansville.

under it, are now in no position to complain, after having permitted the execution of the contract and the performance of the work under it; thus accepting benefits without objection until called upon to pay for them. Such an objection, it has often been held, cannot avail. *Board, etc., v. Plotner, ante*, 116, and authorities there cited. See, also, *May v. City of Detroit*, 26 Mich. 263; 12 Am. Law Reg. (N. S.) 149.

We do not understand counsel for appellees to contend that, if the lien of the city is valid, it is not senior to the mortgage. However, the seniority of the assessment is expressly declared by the statute, section 4290, Burns' R. S. 1894, which has its reason in the conclusion that the security has been enhanced in proportion to the amount of the improvement lien.

We are of opinion, therefore, that the court's conclusion of law extending priority of liens in favor of the mortgage was erroneous. The judgment is reversed, with instructions to restate the conclusions of law in accordance with the conclusion herein stated.

CHANDLER ET AL. v. THE CITIZENS NATIONAL BANK
OF EVANSVILLE.

[No. 18,341. Filed February 25, 1898.]

APPEARANCE. — *Special Appearance.* — *Jurisdiction.* — *Cross-Complaint.* — *Waiver.* — Where a defendant enters a special appearance and unsuccessfully denies the jurisdiction of the court over his person, and afterward enters a general appearance and files a cross-complaint demanding affirmative relief, he thereby waives the question of jurisdiction.

From the Vanderburgh Superior Court. *Affirmed.*

George Palmer and J. E. Williamson, for appellants.
Azro Dyer and Alexander Gilchrist, for appellee.

JORDAN, J.—The Citizens National Bank of Evans-

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166	536

Chandler et al. v. The Citizens National Bank of Evansville.

ville, Indiana, brought this action against John J. Chandler to recover upon certain promissory notes held by it, and to foreclose a lien on bonds pledged as a security for the payment of the notes. The complaint, among other things, averred that appellant, Giles, claimed, or asserted some title or interest in the bonds in suit, and he was made a party defendant to the action to answer to his interest. Giles entered his special appearance and moved to quash the summons and to set aside the return of service. This motion the court denied, and an exception was duly reserved to this ruling. He, Giles, then entered a general appearance to the action, and filed an answer in denial. Subsequently, he filed a cross-complaint, making the plaintiff, and his codefendant Chandler parties defendant thereto. In this pleading he averred that he was the owner of the bonds described in the plaintiff's complaint, and demanded that the court order that they be delivered up, and surrendered to him. Issues were joined between the appellant and the plaintiff and codefendant upon the cross-complaint, and a trial resulted in the court awarding a judgment in favor of the bank, against Chandler, for \$9,000.00, and decreed that the lien which the plaintiff held upon a part of the bonds be foreclosed, and further adjudged that a portion of the bonds involved in the suit belonged to the appellant Giles, and these were ordered to be surrendered to him. He then moved for a new trial, which was denied, and he appealed from the judgment of this court. The overruling of his motion on special appearance to quash the summons and set aside the service thereon, is the only alleged error of which appellant complains and presents for review. No attempt is made by the appellee to sustain the sufficiency of the summons or its service upon the appellant, Giles, but it is insisted that he, by filing his cross-

Chandler et al. v The Citizens National Bank of Evansville.

complaint against the plaintiff, and his codefendant in the action, thereby submitted his person to the jurisdiction of the court, as to the entire cause, and consequently any question in respect to the jurisdiction of his person under the original process was waived. Giles, as it appears, after the court had denied his motion to quash the original process, and set aside the return of service, entered a full appearance, and filed a general denial as his answer to the complaint. Thereafter he filed a cross-complaint, instituting thereby a cross-proceeding in the original cause against the plaintiff and his codefendant, whereby he sought to be adjudged the owner of and obtain the possession of the bonds set up in the complaint. Not only did he demand affirmative relief, but the court by its judgment from which this appeal is prosecuted, awarded to him the relief in part part which he asked.

The settled rule in this jurisdiction, and in others also, is that a party to an action who under a special appearance in due season, unsuccessfully denies the jurisdiction of the court over his person, does not waive the question of jurisdiction of his person by thereafter answering over, and going to trial upon the merits of the cause of action. The authorities assert, that the defendant under such circumstances, having at the very threshold resisted the jurisdiction of the court in a legitimate manner to the full extent of his power, is not required to desert the case, and leave his adversary to take judgment against him on default. *Elliott's App. Proc.*, sections 677 and 678; *Avery v. Slack*, 17 Wend. 85; *Jones v. Jones*, 108 N. Y. 415; *Hadley v. Gutridge*, 58 Ind. 302. It would, in reason, seem when a defendant went further than he was necessarily required to do in order to contest the action on its merits, and made himself an actor in the proceeding by filing therein a cross-complaint demand-

Chandler *et al.* v. The Citizens National Bank of Evansville.

ing distinct and affirmative relief, that he thereby invoked the jurisdiction of the court over his person, and under such circumstances he ought to be considered as having waived the question of personal jurisdiction, and to occupy the same position as though he had appeared generally to the action in the first instance. In fact, the affirmative relief which he demands in his cross-complaint is upon the theory or hypothesis that the court has jurisdiction of the cause, and also over his person. Consequently, in the event the result on the trial is not as advantageous to him as he considers it ought to have been, he should not be permitted thereafter to question the jurisdiction of the court over his person by reason of some defect or infirmity in the original process, or service thereon. In a standard authority on pleading and practice, it is said: "The principle to be extracted from the decisions on the subject as to when a special appearance is converted into a general one, is, that where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he has been regularly served with process, whether such appearance, by its terms, be limited to a special purpose or not. * * * * And where a defendant becomes an actor in the suit and institutes a proceeding which has for its basis the existence of an action to which he must be a party, he thereby submits himself to the jurisdiction of the court, and no disclaimer which he may make on the record, that he does not intend to do so, will be effectual to defeat the consequences of his act." 2 Ency. of Pleading and Practice, pp. 625, 626, and 627. The same rule or principle is affirmed in the following cases: *Farmer v. National Life Association*, 138 N. Y. 265; *Coad v. Coad*, 41 Wis. 26. The

Chandler *et al.* v. The Citizens National Bank of Evansville.

character and effect of a cross-complaint has been settled by repeated decisions of this court. In such cases the defendant in respect to his cross-complaint becomes a plaintiff, and the plaintiff in the original action becomes the defendant. *Ewing v. Patterson*, 35 Ind. 330; *Board, etc., v. Lafayette, etc., R. R. Co.*, 50 Ind. 85; *Masters v. Beckett*, 83 Ind. 596; *Gardner v. Fisher*, 87 Ind. 376. The filing of such a complaint is held to be substantially the institution of a new action to enforce a separate and distinct right, and the dismissal of the cause of action set up in the plaintiff's complaint, does not prevent the cross-complainant from proceeding with the cross-action to a final termination. See *Anderson v. Wilson*, 100 Ind. 405; *Branch v. Foust*, 130 Ind. 542; *Watts v. Sweeney*, 127 Ind. 116. As a general practice, the original complaint and cross-complaint are heard together, and a judgment is rendered embodying all the points adjudicated, and all the relief awarded under both complaints. *Dice v. Morris*, 32 Ind. 283; *Thiebaud v. Tait*, 138 Ind. 238; 5 Ency. of Pleading and Practice, section 12, p. 685.

Appellant, Giles, under his cross-complaint, having voluntarily made himself a cross-complainant in the action, and asserted his right to the bonds involved therein, and thereby invoked the court's jurisdiction to award him the relief demanded, must therefore be held to have submitted his person generally in the cause to the jurisdiction of the court, and for this reason can not in this appeal base any available error on the ruling of the trial court in denying the motion to quash the original writ.

Judgment affirmed.

Barnett et al. v. Bromley Manufacturing Company et al.

BARNETT ET AL. v. BROMLEY MANUFACTURING
COMPANY ET AL.

[No. 18,420. Filed Jan. 25, 1898. Petition to reinstate denied Feb. 25, 1898.]

APPEAL AND ERROR.—Assignment of Error.—Parties.—The assignment of errors must contain the names of all the parties; the names of the appellants should be written before the abbreviation "vs." and the names of appellees after such abbreviation.

From the Vanderburgh Superior Court. *Appeal dismissed.*

James T. Walker, for appellants.

Charles L. Wedding, for appellees.

MONKS, J.—This action was brought by the Bromley Manufacturing Company and three others against Heiman Barnett and three others, and judgment was rendered in favor of said plaintiffs below.

From said judgment, the defendants in the court below appealed. The parties are designated in the assignment of errors as follows: "The Bromley Manufacturing Company et al., appellees, v. Heiman Barnett et al., appellants." Rule six of this court requires that "The assignment of errors shall contain the full names of all the parties." This rule has not been complied with. Besides the names of the appellants should be written before the abbreviation "vs." and the names of the appellees after said abbreviation, instead of the reverse, as was done in this case. The assignment of errors is the complaint of the parties appealing, and the only parties over whom this court has jurisdiction are those named therein. *Big Four Building and Loan Assn. v. Olcott*, 146 Ind. 176; *Bozeman v. Cale*, 139 Ind. 187, 190, and cases cited; Thornton's Ind. Prac. Code, section 655, note 1; Elliott's App. Proc., section 186, 322.

Miller v. The State.

The parties to the judgment appealed from not being before the court, the cause cannot be determined upon its merits. *Big Four Building and Loan Assn. v. Olcott, supra*, and cases cited.

The appeal is therefore dismissed.

MILLER v. THE STATE.

[No. 18,274, Filed March 8, 1898.]

CRIMINAL LAW.—*Indeterminate Sentence Law.—Verdict.—Indiana Reformatory Act.*—A verdict simply finding the defendant guilty as charged in the indictment and fixing his age without determining the punishment, is authorized by section 8 of the Reformatory Act (Acts 1897, p. 69). p. 609.

SAME.—*Indeterminate Sentence Law.—Cruel Punishment.—Constitutional Law.—Indiana Reformatory Act.*—Section 8 of the Reformatory Act (Acts 1897, p. 69), providing that in the trial of felonies, if the defendant is found to be over sixteen years of age and less than thirty, and he be not guilty of treason or murder in the first or second degree, it shall only be stated in the finding of the court or verdict of the jury that the defendant is guilty of the crime charged, naming it, and that his age found is his true age, and that the court trying such person shall sentence him to the custody of the board of managers of the Indiana Reformatory to be confined at such place as may be designated by such board for a term not less than the minimum time prescribed by the statutes of this State and not more than the maximum time prescribed by such statutes therefor, to be determined by such board of managers according to its rules and regulations, is not in conflict with section 16, article 1, of the constitution, that cruel and unusual punishment shall not be inflicted, and that all penalties shall be proportioned to the nature of the offense. pp. 610-618.

SAME.—*Indeterminate Sentence Law.—Trial by Jury.—Constitutional Law.—Indiana Reformatory Act.*—The provision of the Reformatory Act of 1897 (Acts 1897, p. 69), requiring the jury in the trial of all felonies other than treason and murder in the first and second degree, where defendant is between sixteen and thirty years of age, simply to find the age of defendant and the crime of which he is guilty, and requiring the court to sentence him to the board of managers of the Indiana Reformatory, does not deprive the accused of a jury trial in violation of section 18 of the bill of rights. pp. 619, 620.

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Miller v. The State.

CRIMINAL LAW.—Indeterminate Sentence Law.—Disfranchisement.—Indiana Reformatory Act.—The failure of the court to assess disfranchisement as part of the punishment, under the Reformatory Act, is not an error of which the defendant can complain. *p. 620.*

SAME.—Reformatory Act.—Constitutional Law.—The Reformatory Act of 1897 (Acts 1897, p. 69) is not in conflict with section 1, article 7, of the constitution, providing that "the judicial power of the State shall be vested in the Supreme Court, in circuit courts and in such other courts as the General Assembly may establish," nor with section 1, article 8, providing that "the powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided," as an attempt to devest the judicial department of its powers and confer same upon the board of reformatory managers, as the powers conferred upon the board of managers by said act are administrative and not judicial. *pp. 620-623.*

SAME.—Appeal by Poor Person.—Manuscript of Evidence.—Failure of Court to Furnish.—The refusal of the court to furnish a poor person with a transcript of the evidence in the trial of a criminal cause, as provided by section 1474, Burns' R. S. 1894, after the trial and judgment, is not properly assigned as error of law occurring at the trial. *pp. 623, 624.*

SAME.—Appeal by Poor Person.—Manuscript of Evidence.—Failure of Court to Furnish.—Remedy.—The proper remedy for failure or refusal of the circuit court to furnish a poor person in a criminal cause with a transcript of the evidence at the cost of the county is by an application to the Supreme Court for an order requiring the court to furnish such transcript. *p. 624.*

From the St. Joseph Circuit Court. *Affirmed.*

J. W. Talbot, J. E. Talbot and F. M. Jackson, for appellant.

W. A. Ketcham, Attorney-General, Thomas W. Slick and Merrill Moores, for State.

MCCABE, J.—The appellant was charged in the indictment with burglary and larceny, on May 3, 1897. On a trial of the charge, the jury found him guilty of burglary by their verdict, reading thus: "We, the jury, find the defendant, George Miller, guilty of burg-

lary, as charged in the indictment, and that his age is eighteen years. John Valentine, Foreman." And the following judgment was rendered upon said verdict, to wit: "And the defendant being asked if he has any legal cause to show why the judgment of the court should not be pronounced upon the verdict of the jury, stands mute, and thereupon it is considered and adjudged by the court that the defendant be, and is hereby, sentenced to the custody of the board of managers of the Indiana Reformatory or at such place as may be designated by said board of managers as guilty of the crime of burglary, and that he be confined therein for a term of not less than one year or more than fourteen years, as a punishment for said offense, according to the rules and regulations established by such board of managers, and that the sheriff of this county is charged with the execution of this sentence."

The errors assigned call in question the action of the circuit court in overruling appellant's motion for a new trial, and in refusing appellant's request to be furnished with a longhand transcript of the evidence given in said cause at the expense of St. Joseph county. The ground specified in the motion for a new trial is that the verdict is contrary to law.

The objection to the verdict would perhaps be fatal, in that it would be contrary to and unauthorized by law as it stood prior to April 1, 1897, because it does not "state * * * the amount of fine and the punishment to be inflicted." Section 1906, Burns' R. S. 1894 (1837, Horner's R. S. 1897). But it is contended on behalf of the State that the verdict is not contrary to, and is authorized by, law, to wit: Section eight of the reformatory act, approved February 26, 1897 (Acts 1897, p. 69). That act does authorize just such a verdict and judgment in such a case.

Miller v. The State.

The learned counsel for appellant contend, however, that so much of the reformatory act as authorizes such a verdict and judgment is unconstitutional. The section in question reads thus: "In all cases of felony tried hereafter before any court or jury in this State, if the court or jury find the person on trial guilty of a felony, it shall be the duty of such court or jury to further find and state whether or not the defendant is over sixteen (16) years of age and less than thirty (30) years of age. If such defendant be found to be between said ages, and he be not guilty of treason or murder in the first or second degree, it shall only be stated in the finding of the court or verdict of the jury, that the defendant is guilty of the crime charged, naming it, and that his age is that found by it or them to be his true age, and the court trying such person shall sentence him to the custody of the board of managers of the Indiana Reformatory to be confined at the Indiana Reformatory or at such place as may be designated by such board of managers where he can be most safely and properly cared for, as guilty of the crime found in such finding or verdict, and that he be confined therein for a term not less than the minimum time prescribed by the statutes of this State, as a punishment for such offense, and not more than the maximum time prescribed by such statutes therefor, subject to the rules and regulations established by such board of managers, and it shall be the duty of the board of managers of said reformatory to receive all such convicted persons, and all existing laws requiring the courts of this State to sentence such persons to the penitentiaries or prisons of this State, are hereby modified and changed as to make it the duty of such courts to sentence such prisoners to the Indiana Reformatory. The board of managers may terminate such imprisonment when the rules and requirements

of such Reformatory have been lived up to and fulfilled, according to the provisions of this act."

The next section makes it the duty of the clerk of the court in which the case is tried, where there is a conviction, to send along with the commitment a record containing a copy of the indictment or information filed in the case, the name and residence of the judge presiding at the trial, the names of the jurors and witnesses serving at the trial, with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case.

Section eleven provides that: "The said Board of Managers shall have power to establish rules and regulations under which prisoners in the Reformatory may be allowed to go upon parole outside the reformatory building and enclosure, but to remain, while on parole, in the legal custody and under control of the Board of Managers and subject at any time to be taken back within the enclosure of said Reformatory; and full power to enforce such rules and regulations to retake and imprison any inmate, so upon parole, is hereby conferred upon said Board, whose order, certified by its Secretary, and signed by its President, with the seal of the Reformatory attached thereto, shall be a sufficient warrant for the officers named in it to authorize such officer to return to actual custody any conditionally released or paroled prisoner; * * * *Provided*, that no prisoner shall be released on parole until the said Board of Managers shall have satisfactory evidence that arrangements have been made for his honorable and useful employment for at least six months while upon parole, in some suitable occupation."

The twelfth section provides for certain rules by which the reformation is to be sought by the board of

Miller v. The State.

managers, among which is a record in which is to be entered every fact connected with the history of every prisoner when he enters the reformatory, together with his subsequent conduct affecting his standing, and any facts or personal history which may come to the knowledge of the general superintendent officially, bearing upon the question of parole or final release of the prisoner. And the section then provides: "And it is hereby provided that whenever in the opinion of the Board of Managers any prisoner on parole has violated the conditions of his parole or conditional release, by whatever name, as affixed by the Managers, he shall, by a formal order entered in the Managers' proceedings, be declared a delinquent, and shall thereafter be treated as an escaped prisoner owing service to the State and shall be liable when arrested to serve out the unexpired term of his maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of time served."

Section thirteen provides that: "It shall be the duty of the General Superintendent to keep in communication, as far as possible with all prisoners who are upon parole, and when, in his opinion, any prisoner has for one year so conducted himself as to merit his discharge, and has given evidence that is deemed reliable and trustworthy, that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the General Superintendent shall make a certificate to that effect to the Board of Managers, and, after written notice to all of the Managers, the Board shall, at the next meeting thereafter, consider the case of the prisoner so presented; and when said Board shall find that said prisoner has so done, he shall be entitled to his final discharge."

Miller v. The State.

It is contended on behalf of appellant, first, that these provisions violate section sixteen of article one of the bill of rights in our constitution providing that "cruel and unusual punishment shall not be inflicted. All penalties shall be proportioned to the nature of the offense." Section 61, Burns' R. S. 1894 (61, R. S. 1881).

Frequent attempts have been made in this court to reverse judgments in criminal cases because the punishment adjudged was cruel and excessive. But it has invariably been held that, no matter how harsh and severe it might seem to this court, yet, if it was within the limits prescribed by statute for the punishment of such crimes, this court could not interfere nor reverse the judgment. *Siberry v. State*, post, 684; *Ledgerwood v. State*, 134 Ind. 81, 91; *McLaughlin v. State*, 45 Ind. 338; *McCulley v. State*, 62 Ind. 428; *Shields v. State*, ante, 395. In none of these cases was the validity of the statute questioned.

In the last case cited this court said: "It is also urged as a reason for reversal that the punishment is excessive. The only limitations to the power of the legislature to fix the punishment for crimes are those imposed by the constitution of this State and the United States. Section sixteen, article one, of the constitution of this State, which provides that cruel and unusual punishments shall not be inflicted, has reference to the statute fixing the punishment, and not to the punishment assessed by the jury within the limits fixed by the statute. If the statute fixing the punishment is not in violation of said section of the constitution, then any punishment assessed by a court or jury within the limits fixed by the statute cannot be adjudged excessive by this court, for the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but is a legislative power, controlled only

Miller v. The State.

by the provisions of the constitution." The question, then, is whether the provisions of the act quoted authorize the infliction of cruel and unusual punishment.

✓ The legislation was an attempt on the part of the legislature to obey the mandate contained in section eighteen, article one, of the constitution, demanding that: "The penal code shall be founded on the principles of reformation, and not of vindictive justice." And yet the duty to carry out one provision of the constitution does not authorize the legislature to violate another. The question still remains: Does the statute inflict cruel and unusual punishment? The appellant was convicted of burglary and the punishment prescribed therefor by the criminal code of 1881 was imprisonment in the state prison for any determinate period, at the discretion of the jury, of not less than two years and not more than fourteen years. Section 2002, Burns' R. S. 1894 (1929, R. S. 1881).

Under that statute, if the evidence had shown that appellant was guilty of breaking into an old outhouse, with intent to commit a felony, though he found nothing therein on which to commit the felony, and though the outhouse was practically worthless, yet the jury, in their uncontrollable and unbridled discretion, could send him to the state prison for fourteen years and he would be without remedy.

Certainly, that is more cruel punishment than that provided by the reformatory act. Under the law prior to that act, when the ponderous iron doors of the prison close on the convict it not only shuts him in, and shuts out the bright angel of liberty, but it also shuts out of the convict's heart all hope, which is the anchor of the soul, because in the absence of such legislation he is utterly powerless by any amount of good conduct or penitence to assuage or mitigate the severity of his punishment. Is it at all strange that,

Miller v. The State.


with liberty and hope gone, the convict's heart should break, or that he should, in his helpless condition, settle down to the belief that society was his bitter-hating enemy; and thus brooding over the subject through the long years of his prison toil without recompense, and tears all in vain, is it at all strange that he should, at the expiration of his term, come out of prison the bitter-hating enemy of society? Clearly not. It was to remedy this manifest evil to society and to the criminal classes themselves that the legislation in question was enacted. So that, when the convict is brought within the prison walls, if his crime be not treason or murder in the first or second degree, the hope of liberty is not shut out of his heart, the anchor of his soul is not taken away, but society whispers in his ear the brotherly message, through the statute in question that "the restoration of your liberty is largely in your own hands." "Your own good conduct and reformation may restore you to liberty and to society as a useful citizen, even before you have served the minimum or shortest time fixed in the criminal code for the punishment of your crime, namely, in one year after your imprisonment begins," because the minimum term of imprisonment prescribed by the criminal code for a large majority of the felonies falling within the reformatory act is two years and some three years. The minimum term in a small number is three years, and in still smaller number it is one year, and in a very few cases it is six months. And we are gravely told by appellant's learned counsel that this act violates the constitution, in placing it within the convict's power by good conduct, fidelity, and trustworthiness while on parole, to mitigate the severity of his punishment by being restored to liberty conditionally, and, it may be, finally discharged, long before the very shortest term he would be com-

Miller v. The State.

elled to serve under the old law, because such provision is cruel punishment.

To say so would require us to turn back the hands on the dial of human progress a hundred years. To call these provisions "cruel punishment" is to mock at all humanizing efforts. It is to cast a stigma on all our benevolent institutions, which stand as noble monuments of the goodness of the human heart. In short, it is to deny the fatherhood of God and the brotherhood of man.

Appellant's contention, substantially, though not in words, that that part of the act authorizing a judgment for the maximum term of imprisonment specified in the section of the criminal code under which he was convicted must be looked to alone in determining the question whether the punishment prescribed is cruel or not, is not tenable. The whole of the act bearing on the question of punishment must be looked to in construing the different parts. In upholding the constitutionality of a similar act of the Illinois legislature, the supreme court of that state, in the course of a very learned opinion, said: "We think that the judgment and *mittimus* in this case must be read and interpreted in the light of and under the restrictions imposed by the statute upon which they are based. That statute provides, that although the sentence is a general sentence to imprisonment, yet that 'such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced.' This provision, and others of like import, being read into the judgment and *mittimus*, we think that it should be regarded that the judgment and commitment in this case were for twenty years, that being the maximum term provided by law for the crime of burglary." *People, ex rel., v. State Reformatory*, 148 Ill. 420, 36 N. E. 78.



Miller v. The State.

In *Woodward v. Murdock*, 124 Ind. 437, involving the validity and construction of the act of 1883 relating to shortening the prisoner's term by deductions therefrom, this court said, on page 444, that: "The law allowing him credit for good time entered into the judgment as if written therein, and, therefore, by the very language of the judgment the appellant's time expired on the 13th day of December, 1889." And so here the reformatory act may be read into the judgment wherever necessary to make the meaning of the judgment clear or make it effectual.

In construing this provision of the constitution in *Hobbs v. State*, 133 Ind., on pp. 408 and 409, this court said: "The second point, that the act is in violation of the provisions of the constitution, that 'cruel and unusual punishment shall not be inflicted,' has the merit of possessing some originality; but the position assumed seems to be without authority to support it. We have been unable to find but a single instance in which this provision of the constitution has been in question before this court, and then the question was regarded as possessing no merit, and was disposed of without serious consideration. This provision of the constitution is found also in the constitution of the United States in the same words, and Mr. Story, in his work on the constitution, says, 'it is an exact transcript of a clause in the Bill of Rights framed at the revolution of 1688.' He says, further, that 'the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments, * * * to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of the Stuarts.' * * * The word 'cruel,' when consid-

Miller v. The State.

ered in relation to the time when it found place in the Bill of Rights, meant not a fine or imprisonment, or both, but such as that inflicted at the whipping-post, in the pillory, burning at the stake, breaking on the wheel, etc. The word, according to modern interpretation, does not affect legislation providing imprisonment for life or for years, or the death penalty by hanging or electrocution. If it did, our own laws for the punishment of crime would give no security to the citizen. Neither is punishment by fine and imprisonment 'unusual.' The same doctrine was applied to a similar constitutional provision, in upholding the constitutionality of the reformatory act of Illinois, in all material respects like our own, in the case of *People, ex rel., v. State Reformatory, supra*; also in *George v. People*, 167 Ill. 447, 47 N. E. 741.

The only plausible objection that could be urged in reason to the act, as to the character of the punishment when mitigated as provided in the act, is that it is too mild, instead of being cruel. That, however, is a legislative and not a judicial, question.

Nor do we think the act conflicts with that clause of section sixteen of the bill of rights requiring the punishment to be proportioned to the nature of the offense. The supreme court of Illinois on that point says: "We think that from the fact that the statute here in question imposes the maximum term of imprisonment provided by law for the crime for which the prisoner is convicted, it does not follow that such statute is in violation of the constitutional requirement that 'all penalties shall be proportioned to the nature of the offense.'" *People, ex rel., v. State Reformatory, supra*. The same doctrine was in effect held in *George v. People, supra*. We therefore hold that the act does not violate section sixteen of the bill of rights.

Miller v. The State.

It is also contended that the act violates section thirteen of the bill of rights, in that it does not allow the defendant a trial by jury, because, as is contended, it makes the punishment depend upon the determination of a board of managers, arrived at in an *ex parte* manner, and upon hearsay evidence, in a county other than that in which the offense was committed. But the trial and finding of the guilt or innocence of the accused are authorized to be by a jury, in the county where the offense is alleged to have been committed. But, because the jury are not allowed to fix the amount of the punishment which is to be inflicted, it is contended that the reformatory act deprives the accused of a jury trial, in violation of said section thirteen of the bill of rights. This very objection to a similar act, under a similar constitutional provision in the constitution of Illinois, in *People, ex rel., v. State Reformatory, supra*, at p. 422, was held not good. It was there said: "Nor is it true that a prisoner on trial for burglary and larceny, or for any other violations of the criminal law, has a constitutional right to have the quantity of punishment fixed by a jury. At common law the jury either returned a special verdict, setting forth all the circumstances of the case and praying the judgment of the court thereon, or a general verdict of guilty or not guilty. The punishment was fixed by the court, and governed by the laws in force. (Blackstone's Com., Book 4, 361.) * * * The constitutional right of trial by jury is limited to the trial of the question of guilt or innocence, and we think there can be no question of the validity of the sections of the statute to which we have made reference in this connection." The supreme court of Illinois again decided the same way. *George v. People, supra*. We therefore conclude that the act does not deprive the defendant of a jury trial, in violation of the constitution. / c

Miller v. The State.

The only difference between the procedure in felonies under the reformatory act and that under the criminal code prior thereto, is that the jury only find whether the defendant is guilty, and his age, but do not, as before, also fix the punishment. The judge now fixes not only the punishment as to imprisonment, but as to all other penalties prescribed by the section of the criminal code with the violation of which the defendant was charged.

In this case, the court, in addition to the imprisonment, ought to have adjudged as part of the punishment that appellant be disfranchised and rendered incapable of holding any office of trust or profit for some determinate period.

In fixing the imprisonment the court has no discretion, but must adjudge the same as fixed by the reformatory act. The amount of fine or length of disfranchisement is to be determined and fixed by the court in its discretion, within the limits fixed by the statute prescribing the punishment for the particular offense.

No question, however, has been made as to the failure of the court to assess disfranchisement as a part of the punishment. And it is settled that such failure is not an error of which appellant can complain. *State v. Arnold*, 144 Ind. 651, 659, and authorities there cited.

It is next contended that the act violates section one of article seven of the constitution, providing that "The judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish." And that it violates section one, article three, providing that "the powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the func-

Miller v. The State.

tions of another, except as in this constitution expressly provided."

Appellant's contention on this point is thus stated by his counsel: "It attempts to confer judicial powers upon the board of managers and general superintendent of said reformatory, by permitting them to consider and determine whether or not he has ever before been convicted of a felony; whether or not the jury who found the prisoner's age were or were not mistaken; what his personal history has been; whether or not it has been good or bad; and what his conduct has been in the reformatory; and, taking these things into consideration, determine the length of time for which the prisoner shall be confined or punished."

None of these considerations have anything whatever to do with the defendant's guilt, nor with the question as to what judgment should be pronounced upon a finding or verdict that he is guilty of the crime charged in the indictment, nor with the amount or quantity of punishment to be inflicted on him by the judgment.

The constitution of Illinois, as to the division of the powers of government, is precisely like ours, and the supreme court of that state, in *George v. People, supra*, as to the point now in question, said: "It is also claimed that the act is unconstitutional because it attempts to divest the judicial department of certain of its powers and confer those powers on the executive department, in violation of article three of the constitution." After quoting that article, the court proceeds: "It may be conceded that it is beyond the power of the legislature to invest ministerial officers with judicial powers. If the act therefore confers upon mere ministerial officers judicial powers it cannot be sustained. * * * While it might be a difficult matter to draw a line of distinction between


Miller v. The State.

judicial and ministerial functions which would fit every case which might arise, yet we think it can be determined from the authorities, without much uncertainty, to which the duties conferred on the prison board and the warden properly belong." Then the court goes into an exhaustive review of the authorities upon that subject, the statute there and ours being practically the same, and the court then says: "After due consideration we have reached the conclusion that it does not confer judicial power on the warden or the prison board." To the same effect is the *People, ex rel., v. State Reformatory, supra*. The same conclusion was reached by the supreme court of Ohio in upholding a reformatory act of that state, similar to our own, in *State v. Peters*, 43 Ohio St. 629, 650; *Commonwealth v. Brown*, 167 Mass. 144, 45 N. E. 1; *Conlon's Case*, 148 Mass. 168, 19 N. E. 164. Both of the latter cases uphold the constitutionality of a similar statute in Massachusetts. In the case in 167 Mass. it is said: "It is suggested, again without argument, that St. 1895, c. 504, under which the defendant is sentenced, is unconstitutional. This statute requires the sentence in certain cases to be for a term of not less than two and one-half years, and not more than a maximum fixed by the court, and not longer than the longest term fixed by the law for the punishment of the offense. Such a sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued as provided by section two."

So that the judgment of guilty and sentence is complete and effective, so as to warrant and require the convict to remain in prison to the end of the maximum term fixed in the judgment of conviction, unless ministerial or administrative officers, the board of managers, acting under the authority of the act, shall shorten the term of service in case a reformation of the convict is effected.

Miller v. The State.

The power to do this is not judicial power, but is a purely ministerial or administrative power. It is no more the exercise of judicial power than the power of the Governor to "grant reprieves, commutations, and pardons, after conviction." Const., article 5, section 17. Nor is it the exercise of the pardoning power. " 'Pardon' is remission of guilt; 'amnesty,' oblivion or forgetfulness." Anderson's Law Dictionary, 745. The act of the board only shortens the term prescribed by the sentence and leaves the conviction of guilt unaffected.

The act of the board of managers in shortening the term of imprisonment is the exercise of the same kind of power authorized by the act of 1883, section 8238, Burns' R. S. 1894, in which it is provided that for the first year of good conduct of the convict he was allowed a credit of one month, two, three, and four months for the second, third and fourth years respectively, and five months additional for each succeeding year. These credits, thus shortening very materially, the term of the sentence, are given not by the court, nor by the Governor under his power of pardon, but purely and simply by administrative officers, the prison board. And, although such laws have been in force in this State for over a quarter of a century, it has never been suggested that they either conferred judicial powers on administrative officers, or interfered with the judgments of courts or the pardoning power of the Governor. On the contrary, the validity of such legislation was upheld by this court in *Woodward v. Murdock*, *supra*. We therefore conclude that the act does not violate the section of the constitution referred to. 

The only other error alleged is the court's refusal to furnish appellant with a longhand manuscript of the evidence, he having made a proper showing, bringing

Miller v. The State.

himself within the provisions of the statute requiring the court so to furnish such manuscript at the expense of the county. But such refusal was after the trial and judgment, and therefore, the court's action did not affect the trial. The seventh ground for a new trial specified in the criminal code is "error of law occurring at the trial." This error did not occur at the trial. Nor does the error fall within any of the other eight grounds specified in the criminal code for a new trial. Nor does it furnish any ground for a distinct assignment of error in this case. We have no means of knowing that the evidence if it were here, would not abundantly sustain and uphold every act of the court leading to the judgment, except the unsupported statement of his counsel. The presumption of law is that the judgment of the trial court was right until that is overcome by a showing in the record. The remedy of the appellant was an application to this court for an order requiring the circuit court to furnish the transcript at the expense of the county on a proper showing.

Judgment affirmed.

DISSENTING OPINION.

HOWARD, C. J. (Dissenting.)—I am unable to concur in the conclusion that the Indiana Reformatory Act, as interpreted by the majority of the court, is constitutional. That act, as construed by the court, requires that the appellant, for the crime of burglary, should receive an indeterminate sentence of imprisonment, not to be for less than two years nor more than fourteen years. The best defense that can be made of the legality of such a sentence is that it is, in effect, a sentence of imprisonment for fourteen years. Yet it must be plain that the legislature did not intend this result, else it would have said so, and omit-

Miller v. The State.

ted all reference to the minimum time. The clear meaning of the act, if indeed, it does provide for an indeterminate sentence, is, rather, that the sentence should be for some time more than two years, and less than fourteen years, such time to be finally determined by the board of managers of the reformatory. That, however, would be to substitute for the judgment of the court trying the case the judgment of the administrative officers appointed to carry out the sentence. Such an interpretation of the act makes it a plain invasion of the constitutional functions of the judiciary. If, on the other hand, it should be conceded that the sentence is, in effect, a sentence of imprisonment for the maximum period of fourteen years, then we have the anomaly that there is no gradation in the crime of burglary; that the ragged boy who lifts a latch and steals a loaf of bread for his suffering mother, brothers, and sisters is to receive his fourteen years, quite the same as the crime-hardened reprobate who breaks into a banking house and carries off the life earnings of aged and helpless depositors. Such a construction, however, cannot be in harmony with the provisions of the constitution, that "All penalties shall be proportioned to the nature of the offense."

Q As I look upon it, the law may be upheld by an obvious construction, and one in harmony with every provision of the constitution; and, if this can be done, it is, of course, our duty to give to the act such construction. The act provides for confinement in the reformatory "for a term not less than the minimum time prescribed by the statutes of this State, as a punishment for such offense, and not more than the maximum time prescribed by such statutes therefor." Is it not a reasonable interpretation of these words to

say that their meaning is, that the court, after hearing and considering all the facts and circumstances, should fix a definite term of imprisonment, somewhere between the minimum and maximum times prescribed by the statutes? That would be quite in harmony with the practice under the law as it was formerly understood. The statute in relation to burglary prescribes as a part of the punishment that the convicted person "shall be imprisoned in the state prison not more than fourteen years nor less than two years." No one ever knew a court, under this statute, to say to a defendant, "You have been convicted of burglary, and you will be imprisoned therefor not more than fourteen years nor less than two years." It was, on the contrary, well understood that, while the statute made the punishment indeterminate, between certain limits, the court, in its sentence, must name a determinate term of imprisonment within such limits, so that, in every case, as required by the constitution, the penalty "shall be proportioned to the nature of the offense." So interpreted, the act of 1897 would be in harmony with the constitution, and would also serve to accomplish all the beneficial designs intended by the legislature. As interpreted by the court, the act seems to me to make a mere figure-head of the trial judge, and to transfer the constitutional discretion and judgment of the judiciary to officers of the administrative department of the government; punishing also the culprit, not according to the degree of the offense of which he is convicted, but according to his conduct in the reformatory and the probability of his receiving remunerative employment after he gets out.

Miller v. The State.

DISSENTING OPINION.

JORDAN, J.—While I yield due respect to the majority opinion of this court, still I cannot concur therein so far as it sustains the constitutional validity of the provisions of the act of 1897 herein involved, which require the court, without exercising any judicial discretion whatever, to impose an indeterminate sentence on a person convicted of a felony. Or which, rather, command the court, in effect, to turn the convicted person over to the custody of the board of managers of the Indiana Reformatory Prison, there to be confined as provided, not beyond the maximum limit of imprisonment fixed by the statute defining the offense. Article three of our constitution distributes the powers of the government into three separate departments, the legislative, the executive, including the administrative, and the judicial, and denies the right of any person charged with official duties under any one of these departments to exercise any of the functions of another, except as in the constitution expressly provided. Any attempt to deprive one department of its rights and powers under the constitution must be carefully watched and guarded, and no encroachment of one upon the powers of the other can be permitted; otherwise, the constitutional rights of the citizen may be frittered away, and the maintenance of a republican form of government be impaired.

The statute defining the offense of which the prisoner in the case at bar was convicted, provides, as a part of the punishment to be inflicted, imprisonment for a term not less than two nor over fourteen years. The law involved recognizes the existence of the provisions of this penal statute, but nevertheless proceeds to divest both the jury and the court of the power of exercising judicial functions, in determining,

Miller v. The State.

between the minimum and maximum limits, what the term of imprisonment shall be. Not only are the trial, conviction, and sentencing of a person convicted of the commission of a crime, a judicial duty, but also, in my opinion, is the right to assess the punishment, and thereby fix the term of imprisonment provided, within the limits of the statute, a judicial function, of which the court wherein the accused is tried, cannot be deprived by the legislature.

The provisions of the various sections of our penal code relating to crimes classified as felonies by the law are expressly recognized by the statute in question as still existing; especially is this true in regard to the limits of imprisonment. Certainly, the right to apply the law as it then exists is the peculiar province of the court or jury in the trial of a criminal cause. Consequently, the right to determine and decide as to the extent to which a convicted person shall be punished by imprisonment under and within the limits of an existing law cannot be wrested from the court and jury and lodged elsewhere. The provisions of the statute under consideration wholly rob the court of all judicial discretion in regard to the term of imprisonment, and in imperative language require it to sentence the prisoner to the custody of the board of managers of the reformatory, for an indefinite term.

While the constitutional validity of a statute which simply lodges in the court, where a person accused of crime is tried, the power of assessing the punishment, instead of leaving it with the jury trying the case, may be conceded; but when a law goes beyond this, and deprives both the jury and the court of this power, as does the one in dispute, certainly it must be held to infringe upon the constitutional rights of the accused, which he has, to demand, in the event of his conviction,

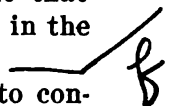
Miller v. The State.

that his punishment be judicially determined under the existing law, which he has been convicted of violating, and which prescribed the penalties for its violation. The trial cannot be said to have ended until his punishment is determined and adjudged by the court. A statute of the state of Michigan which did not go to the extent of the one here involved, leaving, as it did, the question of an indeterminate sentence to the discretion of the court, was held to be invalid. *People v. Cummings*, 88 Mich. 249, 50 N. W. 310. A similar statute in Ohio, which also made the question of imposing an indeterminate sentence one of judicial discretion, was upheld. *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81.

The decisions of the supreme court of Illinois, cited in the majority opinion, whereby the validity of a law similar in some respects to the statute now in controversy was sustained, are, in my opinion, neither satisfactory nor convincing in their reasoning. The effect of these decisions is also impaired by the fact that they were rendered by a divided court.

That the validity of a law providing for the parole, under prescribed rules and regulations, of prisoners who have been sentenced for a definite term of imprisonment, before the expiration of their terms, may be sustained, I think, may be conceded; but that is not the vital question presented for decision in the case at bar.

The feature in the statute which leads me to condemn it as antagonistic to the constitution is that which unquestionably divests the judiciary of its rights and powers, to a certain extent; and to this extent, and in this respect, the law, in my judgment, is invalid, and cannot be sustained; and this must be true without regard to the question of whether it invests some ministerial board or person with judicial



Miller v. The State.

functions. The doctrine is universally affirmed that courts, being a co-ordinate branch of the government, are not, within their sphere, subject to legislative control. Cooley, Constitutional Limitations, 114 and 116. But, under this statute, the court, in respect to the term of imprisonment, is wholly controlled by the will of the legislature. It is not permitted to decide what, in its judgment, under the circumstances in the particular case, ought to be the term of imprisonment within the limits provided by law. The man who is convicted of the theft of a plug of tobacco of the value of ten cents must be turned over to the prison officials to be restrained of his liberty for the same period as one who has committed the heinous offense of stealing his neighbor's hogs or sheep of the value of \$24.00. The court can exercise no discretion and decide in accordance with the dictates of his own judgment. This is so evident that a mere reading of the statute is sufficient to condemn it in this respect.

It is insisted that the legislature has the power to provide that the term of imprisonment for the crime of burglary shall be fourteen years and no less, and that the judgment of the court in the case at bar in effect inflicted the maximum term of imprisonment, which was fourteen years. While the power of the legislature to declare that the punishment for the crime of burglary shall be imprisonment for the term of fourteen years in the state prison, and no less, may be conceded, but how, or in what manner can this concession lend any support to sustain the validity of the statute? As heretofore stated, the law under which appellant was convicted extends the limitation of imprisonment from two to fourteen years, and, if it can in reason be said that the trial court in this case simply inflicted the maximum punishment provided by the law defining the offense of burglary, then it certainly may be

Miller v. The State.

asserted that in doing so the court responded solely to the command of the statute in controversy, and not, under the circumstances in the particular case, to the dictates of its own judgment as to what the term of imprisonment should be within the limitation provided by an independent statute.

The law may be said to be crude and half-baked in its provisions, and possibly open to objections which have been urged against it, that it will in some cases result in great injustice. While these are matters which do not address themselves to a court, still, as the law is to be upheld, they may be mentioned as proper for legislative consideration in the future.

As to whether, in the event a minor is convicted, imprisonment for his offense in the county jail may be substituted for imprisonment in the state prison, as provided by section 1833, R. S. 1881, is a question which, under the act in controversy, is left to judicial construction. Equally so is the question as to whether a fine and disfranchisement shall be adjudged as a part of the punishment by the act, where the same are provided as a part of the punishment by the penal statute of which the accused person has been convicted of having violated.

This law is certainly more sweeping in its provisions than any other on the same subject enacted by sister states which has come under my observation. It seems to be impressed with the impracticable and sentimental idea of certain theorists who believe that a greater justice will be meted out to the convict, and his condition bettered, by incarcerating him within the walls of a prison for an indeterminate period, without any regard to the circumstances surrounding the offense of which he has been convicted, there to remain until he can secure his liberty by ingratiating himself into the good graces of the board of parole.

I have endeavored somewhat briefly to state the

French v. Cunningham et al.

reasons which I consider the cardinal ones for holding the law invalid, and, in my opinion, it should be so adjudged, without any regard to the question of expediency or the results which may follow. These are questions which as a general proposition should exert no control over courts in reaching a conclusion in a case involving constitutional rights.

FRENCH v. CUNNINGHAM ET AL.

[No. 17,890. Filed March 8, 1898.]

149	632
156	71
156	75
148	632
170	343

ATTORNEY'S FEES.—*Action for on Quantum Meruit.*—Where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented by the client, the attorney may, as a rule, recover on the *quantum meruit* for the services rendered by him. p. 635.

SAME.—*Contingent Fees.*—Where the compensation of an attorney is contingent on the successful result of the suit, the measure of damages is not the contingent fee, but the reasonable value of the services rendered. p. 635.

SAME.—*Contract for Entered Into While the Relation of Attorney and Client Existed.*—In the enforcement of a written contract of employment entered into between attorney and client after the employment of such attorney by the client, the burden is upon the attorney to show the fairness of the transaction, and that the compensation provided for in the subsequent agreement does not exceed a fair and reasonable remuneration for the services to be performed; but such contract is not void by reason of it having been entered into subsequent to an employment. pp. 636, 637.

WORK AND LABOR.—*Contract.—Breach Of.—Measure of Damages.—Quantum Meruit.*—When a person is performing services according to the contract of employment and is prevented from completing the same by the employer, in violation of the terms of the contract, the employe can recover the reasonable value of his services, not exceeding the contract price, on the *quantum meruit*, or he may sue upon the contract for the breach thereof, and the measure of damages is the amount that will compensate him for the reasonable value of his services, as well as his loss, if any, on account of not having been permitted to complete the contract. pp. 638, 639.

ATTORNEY'S FEES.—*Amount of Recovery in the Absence of Contract.*—In the absence of a contract fixing the amount of compensation, an

French v. Cunningham et al.

attorney is entitled to recover what his services are reasonably worth, and it makes no difference, as to this right, whether the services were successful or not, unless the attorney's want of success was caused by his negligence or bad faith. p. 639.

ATTORNEY'S FEES.—Partners.—Parties.—Where plaintiffs were engaged in the practice of law as partners and defendant engaged one of them to render services for her as an attorney the other partner has such an interest in the compensation for such services as to make him a proper party plaintiff in an action to recover such compensation. p. 640.

From the Marion Circuit Court. *Affirmed.*

Alex. M. Harrison, Arthur H. Noyes, William A. Pickens and Linton A. Cox, for appellant.

W. A. Ketcham and Baker & Daniels, for appellees.

MONKS, J.—This action was brought by appellees, as partners, against appellant, to recover on *quantum meruit* for professional services rendered appellant, and also to recover for money advanced by them for expenses in connection with such services. The court made a special finding of facts, and stated conclusions of law thereon in favor of appellees, and, over a motion for a new trial, rendered judgment against appellant. The only errors assigned, and not waived, are (1) that the court erred in its conclusions of law; (2) the court erred in overruling appellant's motion for a new trial.

The only questions presented by the motion for a new trial depend for their determination upon the evidence which is not in the record under the rule declared in *Campbell v. State*, 148 Ind. 527, and cases there cited; *Citizens Street R. R. Co. v. Sutton*, 148 Ind. 169, and cases cited.

It is insisted by appellant that the written contract provides for the payment of a contingent fee, and, as appellees were not successful within the time fixed, and other counsel were employed, they are not entitled to any compensation whatever.

French v. Cunningham et al.

The special finding shows that appellees, who were engaged in the practice of law as partners, were first employed in September, 1892, by appellant, to set aside, by contest or otherwise, the codicil to her father's will, her interest in such controversy being over \$500,000.00, without any agreement as to the compensation to be paid, and that they were engaged in the investigation of the law and facts of the cause until February 16, 1893, when a written contract was made and signed by one of the appellees, which provided: "In case said attorney succeeds in setting aside said codicil or in obtaining such modifications thereof as may be acceptable to said Blanche W. Culbertson, without the employment by her of other counsel, then he is to receive for his services the sum of \$10,000.00, whether the same be by suit or not; provided the same is finished and accepted within sixty days from this date. If at the end of sixty days from this date said attorney shall not have succeeded in setting aside said codicil or securing a settlement satisfactory to said Blanche W. Culbertson, it is understood that said time shall be extended or a new contract of employment made between the parties." After the execution of this contract, appellees continued the investigation of said cause until in April, 1893, when an action was commenced to contest the codicil of said will. Afterwards, in May, additional counsel were employed to assist appellees in said cause. On June 28, 1893, appellant by letter, dismissed appellees and afterwards would not permit them to perform or discharge any duties as attorneys in said cause, and said cause was compromised November 22, 1893, without a trial. The special finding shows that appellees were ready and willing at all times to comply with their part of the contract made when first employed, as well as the written contract of

French v. Cunningham et al.

February 16, 1893, and the only reason why they did not render any services as attorneys after June 28, 1893, was because appellant would not consent or permit them to do so. There can be but one conclusion drawn from the facts stated in the special finding, and that is that the dismissal of appellees by appellant was without any fault on their part.

It is well settled that, where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the client, the attorney may, as a rule, recover on a *quantum meruit* for the services rendered by him. *Scobey v. Ross*, 5 Ind. 445; *Brodie v. Watkins*, 33 Ark. 545; *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *Moyer v. Cantieny*, 41 Minn. 242, 42 N.W. 1060; *McElhinney v. Kline*, 6 Mo. App. 94; *Duke v. Harper*, 8 Mo. App. 296; *Kersey v. Garton*, 77 Mo. 645; *Carey v. Grant*, 59 Barb. (N. Y.) 574; *Badger v. Mayer*, 8 Misc. 533, 28 N. Y. Supp. 765; *Quint v. Ophir Silver Mining Co.*, 4 Nev. 304; 3 Am. and Eng. Ency. of Law (2d ed.), 425-427; *Weeks on Attorneys* (2d ed.), section 334. If the compensation agreed upon is contingent on the successful result of the suit, the measure of damages is not the contingent fee, but the reasonable value of the services rendered. *Badger v. Mayer*, *supra*; *Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Durkee v. Gum*, 41 Kan. 496, 21 Pac. 673, 13 Am. St. 300; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; 3 Am. and Eng. Ency of Law (2d ed.), 427, 431.

Scobey v. Ross, *supra*, is cited by appellant to sustain said contention. In that case Test and Scobey, attorneys, had a contract with the client, Nancy Ross, in which she agreed to pay them \$150.00 of a judgment "when they should collect the same." Scobey, one of the attorneys, collected \$200.00 of the judg-

French v. Cunningham et al.

ment. Mrs. Ross became dissatisfied and discharged said attorneys and employed others, she then sued Scobey for the \$200.00 and recovered judgment therefor. The court said "the question arises, upon what ground could Scobey retain said \$200.00 or any part thereof? Supposing the contract between Mrs. Ross and Messrs. Test & Scobey valid and in force, it had not been fulfilled. The \$500.00 decree had been but in part collected, and no claim for compensation arose under the agreement till the whole of said decree was collected. Supposing the contract valid, but broken and rescinded, then the claim of Test & Scobey would only be for a reasonable compensation for services actually performed, with, perhaps, damages for breach of the contract; but such compensation and damages could not be deducted in this suit, as no plea, notice, or counterclaim was filed, but the general issue simply pleaded." It is clear that in said case, if the proper pleading had been filed, that the attorneys would have been entitled to a reasonable compensation for their services in said cause in the collection of said \$200.00 and damages for any breach of the contract by the client.

It is also urged that, as said written contract was entered into after appellees had been employed as attorneys, and while the relation of attorney and client existed, the same was void; that it is not only impossible to recover upon the contract, but there can be no recovery on the *quantum meruit* for services rendered under the contract. Such contracts, however, if invalid, are only presumptively so, and in such case the rule is that the burden of proof is upon the attorney to show the fairness of the transaction, and that the compensation provided for in such subsequent agreement does not exceed a fair and reasonable remuneration for the services which have been rendered,

or which it is his duty to render. *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. 401, and note pp. 413-416, 21 L. R. A. 366; *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80, 9 L. R. A. 90, and note; *Dickerson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *LeCatt v. Sallee*, 3 Porter (Ala.) 115, 29 Am. Dec. 249; Weeks on Attorneys (2d ed.), sections 346, 363, 364; 3 Am. and Eng. Ency. of Law (2d ed.), 433. The rule is thus stated in 1 Story Eq., section 311: "But the burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other."

In *Dickerson v. Bradford*, *supra*, the court said: "Having entered upon the duties of the relation without a contract stipulating the measure of compensation, the appellee and his partner, had no other legal claim on the appellant, than the right to demand of him reasonable compensation for their services. If the contract subsequently made stipulates for a greater compensation, it cannot be supported, unless it affirmatively appears that there is an absence of undue influence, and the best evidence of its absence, would be that the attorneys gave to their client the information and advice, which it would have been their duty to give, if the client had been dealing with a stranger, conferring on him the same rights and advantages, on the same considerations, which the contract confers on them." See, also, *Judah v. Trustees Vincennes University*, 23 Ind. 272, 280; *McCormick v. Malin*, 5 Blackf. 509, 523. The rule is, however, that when such contracts cannot be upheld and enforced that the attorney may recover the reasonable value of

French v. Cunningham et al.

the services rendered on the *quantum meruit*. *Elmore v. Johnson, supra*; *LeCatt v. Sallee, supra*; *Planters Bank v. Hornberger*, 4 Coldw. (Tenn.) 531; Weeks on Attorneys, section 364; 3 Am. and Eng. Ency. of Law (2d ed.), 433, and note 1. So that it is not necessary to decide whether said written contract of February 16, 1893, is invalid under the facts found, for the reason that even if it is appellees are entitled to recover on the *quantum meruit*.

The trial court in the special finding, found the reasonable value of the services rendered appellant by appellees, and stated as a conclusion of law that appellees were entitled to a judgment for that amount against appellant. Appellant insists that this was not a proper measure of recovery, but that, when an express contract has been made, but not complied with, and work has been done under it, which has been accepted and used, the measure of recovery is not the reasonable value of the work done, but the benefit which the other party received. In support of this contention appellant cites *McClure v. Secrist*, 5 Ind. 31; *Ricks v. Yates*, 5 Ind. 117; *Adams v. Cosby*, 48 Ind. 155; *Branham v. Johnson*, 62 Ind. 259; *Everroad v. Schwartzkopf*, 123 Ind. 35. In the cases cited the persons employed to do the work either abandoned the same before it was completed, or did not perform the same in the time or manner stipulated in the contract; in other words, they had not performed their part of the contract, but were guilty of a breach thereof, and for that reason could not recover thereon, but could only recover on *quantum meruit* under the rules laid down in said cases. See, also, *Coe v. Smith*, 4 Ind. 79, 82, 83, 58 Am. Dec. 618; *Major v. McLester*, 4 Ind. 591. This rule, however, does not apply if the party doing the work has been prevented from completing it by the other party, in violation of the contract. When the

French v. Cunningham et al.

person employed is doing the work according to contract, and is prevented from completing the same by the other party, in violation of the terms of said contract, the person so prevented from performing his part of the contract can recover the reasonable value of his work, not exceeding, however, the contract price, on the *quantum meruit*, or he may sue upon the contract for the breach thereof, and the measure of damages is the amount that will compensate him, which will include the reasonable value of his work, as well as his loss, if any, on account of not being allowed to complete the same. *Ricks v. Yates, supra*; *Richardson v. Eagle Machine Works*, 78 Ind. 422; *Mooney v. York Iron Co.*, 82 Mich. 263, 46 N. W. 376; Clark on Cont., sections 280, 281, 286; 2 Ency. of Pl. and Prac., 1010, and cases cited in note 2; 3 Am. and Eng. Ency. of Law (1st ed.), 921.

But, whatever may be the rule as to other contracts, the rule as to contracts employing attorneys is as we have shown, that if the same is broken by the client the attorney may recover on *quantum meruit* for the reasonable value of his services, or he may sue upon the contract and recover damages for its breach. 3 Am. and Eng. Ency. of Law (2d ed.), 425-427; Weeks on Attorneys (2d ed.), section 334.

In the absence of a contract fixing the amount of compensation, an attorney is entitled to recover what his services are reasonably worth, and it makes no difference, as to this right, whether the services were successful or not, unless the attorney's want of success was caused by his negligence or bad faith.

It is true, as claimed by appellant, that an attorney cannot recover for services which are absolutely useless, as held in *Hill v. Featherston*, 7 Bing. 569, 20 E. C. L. 304; *Sill v. Thomas*, 8 Car. & P., 762, 34 E. C. L. 624; *Hill v. Allen*, 2 M. & W. 284. This doctrine, however,

French v. Cunningham et al.

is put upon the ground that, if the attorney had possessed the proper knowledge, or had exercised the diligence required, that he would have known that the steps taken and services rendered were unnecessary and improper; in other words, in the cases cited it was held that if through ignorance, want of skill, or negligence, or all, the attorney had taken steps and rendered services that were unnecessary and entirely useless, he could not recover therefor. This is a rule that applies not only to attorneys, but to physicians, surgeons, and others whose profession, business or occupation requires skill and knowledge, and the use of care in its performance. It is not claimed, however, by appellant that appellees failed to perform any duty that was necessary to protect the interests of appellant, or that they did anything for her that was unnecessary or useless, nor is there any finding showing that appellees were lacking in skill and knowledge, or that they were guilty of any negligence in the services rendered by them.

If appellees were engaged in the practice of law as partners, and appellant employed one of them to render services for her as an attorney, the other appellee would have an interest in the compensation for such services, and under our code, in an action to recover the same, would at least be a proper party plaintiff.

Under the facts stated in the special finding appellees were entitled to a judgment against appellant for the reasonable value of the services rendered by them, as well as for the sum expended by them for expenses in connection with their employment as her attorneys. There is no available error in the record.

It is proper to say, that even if the evidence was in the record, under the law as declared in this opinion, and the settled rule in regard not to weighing the evidence when there is a conflict in the same, the con-

Skelton v. The State.

clusion reached would be the same; that is, that there is no available error in the record. Judgment affirmed.

SKELTON v. THE STATE.

[No. 18,881. Filed March 8, 1898.]

CRIMINAL LAW.—Affidavit and Information.—An affidavit and information charging defendant with stealing turkeys is not bad for failure to state that the turkeys were domestic and in possession of the owner where it is charged that they were owned by the person therein named and were of a given value. p. 642.

SAME.—Special Judge.—Objection.—Waiver.—Where in the trial of a criminal cause on motion of the State for a change of venue from the regular judge, a special judge is appointed to try the cause without objection by defendant, he thereby waives his right to question the jurisdiction of the judge appointed by the regular judge. pp. 642, 643.

SAME.—Verdict.—Indeterminate Sentence Law.—Petit Larceny.—Indiana Reformatory Act.—A verdict simply stating the age of defendant and that he is guilty of petit larceny as charged in the indictment, without fixing the punishment to be inflicted, is authorized by the Reformatory Act (Acts 1897, p. 69), where defendant is over sixteen and less than thirty years of age. pp. 643, 644.

SAME.—Indeterminate Sentence Law.—Invasion of Right to Trial by Jury.—Constitutional Law.—Indiana Reformatory Act.—The provision of section 18, article 1, of the constitution granting the accused in all criminal prosecutions the right to a trial by jury is not violated by the Reformatory Act (Acts 1897, p. 69) in not requiring the jury to fix the punishment of defendant. pp. 644, 645.

SAME.—Indeterminate Sentence Law.—Failure of Court to Fix Minimum Punishment.—Indiana Reformatory Act.—In the trial of a criminal cause, under the indeterminate sentence law of 1897 (Acts 1897, p. 69), the failure of the court to fix the minimum punishment in the sentence is not error of which defendant can complain. p. 648.

From the Montgomery Circuit Court. *Affirmed.*

G. W. Paul, H. D. Van Cleave and W. B. Paul, for appellant.

W. A. Ketcham, Attorney-General, Dumont Kennedy and Merrill Moores, for State.

149	641
152	152
149	641
154	249
155	294
149	641
160	310
149	641
161	304

Skelton v. The State.

HOWARD, C. J.—On affidavit and information by the prosecuting attorney, the appellant was found guilty of petit larceny, and sentenced to the Indiana Reformatory. The property alleged to have been stolen consisted of "forty-six turkeys, then and there the personal property of Delila Todd;" and it is assigned and argued as error that the court overruled a motion in arrest of judgment, for the reason that the affidavit and information fail to state that the turkeys were domestic, and in the possession of Delila Todd or some other person. The argument is that the turkeys might be wild ones, and therefore not the property of any person, and hence not subject to larceny. It is alleged, however, that they were "the personal property of Delila Todd;" and this sufficiently shows her ownership. *Turner v. State*, 102 Ind. 425. Their value is also alleged. If the turkeys were owned by Delila Todd, and were of a given value, they could not, at the same time, be mere game birds, untamed rangers of the forest and the prairie.

It is said, further, in support of the motion in arrest of judgment, that the court had no jurisdiction to try the case, for the reason that the regular judge, on motion by the State for a change of venue from the judge, sustained the motion, and appointed in his own stead the special judge who presided below. It may be, as counsel argue, that the statute does not give the State the right in a criminal cause to move for a change of venue from the judge. This, however, would not deprive the regular judge of the power to appoint an attorney in good standing to try one or more causes, or to hold court in his stead. Several sections of the statute make provisions for the appointment of special judges. Sections 1429, 1444, 1446, 1447, Burns' R. S. 1894 (1371a, 1381, 1383, 1383a, Horner's R. S. 1897). More than this, however, the appellant went to trial,

Skelton v. The State.

and submitted himself without objection to the jurisdiction of one who had at least colorable authority to preside as judge. Appellant could not thus play fast and loose with the court,—assume that it had jurisdiction to acquit him, but no jurisdiction to convict him. By not objecting at the time of the trial, he waived all right to question the jurisdiction of the judge appointed by the regular judge to preside at that trial. *State v. Murdock*, 86 Ind. 124; *Smurr v. State*, 105 Ind. 125; *Schlunger v. State*, 113 Ind. 295; *Greenwood v. State*, 116 Ind. 485. In *Smurr v. State*, *supra*, it was said that “where a party goes to trial without objection before a judge assuming to act under color of authority, he cannot, after judgment or conviction, successfully make the objection that the judge had no authority to try the cause.”

One of the reasons given why the motion for a new trial should have been awarded is that “The verdict of the jury is contrary to law.” The reason so given is based on the fact that the jury did not state in their verdict, as required by section 1906, Burns’ R. S. 1894 (1837, R. S. 1881), “the amount of fine and the punishment to be inflicted.” It is true that the statute cited does require that the fine and punishment should be stated in the verdict when the trial is by a jury.

But by section eight of an act approved February 26, 1897 (Acts 1897, p. 69), in force at the time of the trial of this cause, it is provided that: “In all cases of felony tried hereafter before any court or jury in this State, if the court or jury find the person on trial guilty of a felony, it shall be the duty of such court or jury to further find and state whether or not the defendant is over sixteen (16) years of age and less than thirty (30) years of age. If such defendant be found to be between said ages, and he be not guilty of treason or murder in the first or second degree, it shall

Skelton v. The State.

only be stated in finding of the court or verdict of the jury, that the defendant is guilty of the crime charged, naming it, and that his age is that found by it or them to be his true age."

As petit larceny may be punished by imprisonment in the state prison it is, under our statutes, a felony. Section 1642, Burns' R. S. 1894 (1573, R. S. 1881). It therefore follows that, under the provisions above cited from the act of 1897, if valid, the verdict was sufficient; for it was therein stated that the appellant was guilty of petit larceny, and that his age was twenty-two years. Counsel, however, contend that the provisions cited, as to the form of verdict to be returned by the jury, cannot be valid, for the reason that they invade the constitutional right of trial by jury. The constitution provides that: "In all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process for obtaining witnesses in his favor." Const., Art. 1, section 13.

We are unable to see that any of these beneficent provisions of the bill of rights is violated by not requiring the jury to fix the punishment. Our statute, it is true, as we have seen, has heretofore provided that the jury shall in their verdict name the punishment to be inflicted. But the constitution makes no such requirement; and that which the statute has done the statute may undo, provided it remain within the bounds fixed by the constitution. The last act of the legislature controls in case of conflict. Indeed, aside from any statutory requirement, the fixing of punishment cannot be considered as any necessary

part of the trial of a cause. When the verdict or finding has determined the existence of the crime charged, the trial is ended, and the punishment to be thereafter inflicted is the sentence which the court pronounces under the law then in force. The fixing of such punishment seems to be a proper function of a court, rather than of a jury, a matter of judgment, rather than of finding or verdict. Certainly, the leaving of this duty to the court instead of to the jury, as the act in question does, is no invasion of the sacred right of trial by jury. Article six of the amendments to the constitution of the United States secures the same right to jury trial in all criminal prosecutions; but it has never been held that the practice in the federal courts, according to which the court and not the jury fixes the punishment, is an infringement of the right of trial by jury guaranteed by the constitution.

Neither is the provision in question a violation of the constitution, which provides that: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Const., Art. 1, section 19. The law, when applied to the facts found, determines the guilt or innocence of the accused, and, in case of guilt, determines the crime committed. Of all this the jury has supreme control, under the constitution. But the sentence is the judgment of the court as to what, within the statutory limits, ought to be the proper punishment for the crime of which the defendant has been convicted.

We do not think, therefore, that the verdict provided for in the new statute is any violation of the constitution. The right of trial by jury, the right to have the innocence or guilt of the person charged with crime determined solely by a jury of his peers, is as fully guarded under the present as under the former statute.

Skelton v. The State.

But it is further contended that said section eight of the act of 1897 is invalid for at least two other reasons: (1) That it fails to provide for a definite sentence for the crime of which the defendant has been convicted; and (2) that it attempts to confer judicial powers or duties upon the board of managers of the reformatory.

Section sixteen of article one of the constitution provides, among other things, that: "All penalties shall be proportioned to the nature of the offense." By section 2007, Burns' R. S. 1894 (1934, R. S. 1881), petit larceny may be punished with a jail sentence, together with fine and disfranchisement; or it may be punished by imprisonment in the state prison, also with fine and disfranchisement. In section eight, *supra*, of the act here under consideration, provision is made for cases punishable by imprisonment in the state prison. As the jury in this case brought in their verdict under the act of 1897, the punishment must therefore be that provided for petit larceny, in the latter case, which is that the defendant "be imprisoned in the state prison not more than three years nor less than one year, fined in any sum not exceeding five hundred dollars, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period." Section 2007, *supra*. As appellant was found to be twenty-two years of age, the act of 1897 modifies the punishment so provided for by substituting the reformatory for the state prison.

But it is said that the court failed to assess any definite term of imprisonment as punishment for the offense of which the defendant was found guilty. The judgment of the court was as follows: "It is therefore considered, ordered, and adjudged and decreed by the court that the defendant, Charles Skelton, is guilty of petit larceny, and that his age is twenty-two

years; that, for the offense by him so committed, he be confined by the board of managers of the Indiana Reformatory, at the Indiana Reformatory, or at such place as may be designated by such board of managers where he can be most safely and properly cared for, for a term not more than three years. It is further considered and adjudged that the defendant pay the costs herein taxed at \$——. The sheriff of Montgomery county, Indiana, is hereby charged with the due execution of the foregoing judgment."

The writer is of opinion that this judgment was not a compliance with either section 2007, Burns' R. S. 1894 (1934, R. S. 1881), or with section eight of the act of February 26, 1897. The former section, as to the punishment for petit larceny, is still in full force, only in so far as it is modified by the latter act. By the old section the maximum limit of imprisonment in the state prison for the crime of petit larceny is three years, and the minimum limit one year. By the new act, as we have seen, in case the criminal is between sixteen and thirty years of age, as was the case here, the reformatory is substituted for the prison, and it is provided that it shall be adjudged, as a part of the sentence of the court, "that he be confined therein for a term not less than the minimum time prescribed by the statutes of this state, as a punishment for such offense, and not more than the maximum time prescribed by such statutes therefor." The writer does not think it is to be understood that the legislature intended by the law, as so modified, that the court should abdicate its function to adjudge what punishment, within the limits fixed by the statute, should be meted out to a defendant for a crime of which he should be convicted.

The majority of the court, however, for reasons given in *Miller v. State*, ante, 607, are of opinion that

Lilly et al. v. The City of Indianapolis.

the statute authorizes and requires an indeterminate sentence of imprisonment in this case, and that the judgment should therefore be affirmed. The circumstances that the court failed to provide that the appellant should be imprisoned for a term not less than one year, and that he should be fined and disfranchised, are not errors of which he can complain. *State v. Arnold*, 144 Ind. 651. Judgment affirmed. .

LILLY ET AL. v. THE CITY OF INDIANAPOLIS.

[No. 18,019. Filed March 9, 1898.]

149	648
156	591
149	648
160	592
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168	630
149	648
171	664

MUNICIPAL CORPORATION.—*Appropriation for Entertainment of Convention.—Private Subscriptions.—Right of City to Unexpended Balance.*—Having been invested with special authority by the legislature, the common council of the city of Indianapolis appropriated \$75,000.00 out of the treasury of the city for the purpose of defraying the legitimate expense in the preparation for the reception and entertainment of the twenty-seventh National Encampment of the Grand Army of the Republic. The ordinance appropriating the money created an "encampment committee" the members of which were vested with the power of disbursing the funds appropriated. Before the said ordinance was passed the president and secretary of the Commercial Club, an incorporated body, the primary object of which is to promote the business and commercial interests of the city, appeared before the finance committee of the common council, and represented that it would be impossible to secure private subscriptions in a sufficient sum, and stated that if the appropriation was made by the city, that such appropriation should only be drawn upon to make up any deficiency after the private subscriptions, of which the Commercial Club had charge, were entirely exhausted, and that any unexpended balance of the fund appropriated by the city should be turned into the city treasury. Of the \$75,000 appropriated the "encampment committee" appointed by the city turned over \$35,000 to the citizens' executive board upon an order signed by the chairman to the effect that it would be paid out for legitimate expenses only, and any unexpended balance remaining should be turned back into the city treasury. The citizens' executive board also had charge of, but kept in a separate account, the funds collected by the Commercial Club. After the encampment had been held, there remained a balance of \$584.75 belonging

Lilly et al. v. The City of Indianapolis.

to the city's account, which, with some money belonging to the executive board, was turned over to the city treasurer. *Held*, that the city had no claim to any unexpended balance of funds which had been collected by the Commercial Club. *pp.* 651-669.

MUNICIPAL CORPORATION.—*Motive of Common Council.*—Courts will not inquire into the motive of the common council of a city in the enactment of an ordinance. *p.* 665.

From the Marion Circuit Court. *Reversed.*

Albert Baker, Edward Daniels, Ferdinand Winter and Woollen & Woollen, for appellants.

J. B. Curtis, J. S. Duncan, C. W. Smith, H. H. Hornbrook and Ayers & Jones, for appellee.

JORDAN, J.—The city of Indianapolis sued in the lower court, and the relief which she sought under her complaint in the action was an accounting to her from each and all of the defendants for certain sums of money which it was charged had been converted, which, in the aggregate, as alleged, amounted to \$20,000.00, and judgment was demanded accordingly. The parties made defendants to the action were Eli Lilly, William Fortune, and the Commercial Club of Indianapolis; also John W. Murphy, August Keifer, Hugh H. Hanna, James L. Keach, Albert Sahm, Michael Steinhauer and Benjamin C. Shaw, these last named defendants having constituted the members of the encampment committee, created by said city, and invested with the duty and power of receiving and disbursing the money appropriated by said city of Indianapolis to defray the legitimate expenses that might be incurred by reason of the holding therein of the National Encampment of the Grand Army of the Republic in the year of 1893. The defendants, Lilly, Fortune, and the Commercial Club separately demurred to the complaint for insufficiency of facts. The defendants who, as stated, composed the encampment committee, jointly demurred for a like reason. The court

Lilly et al. v. The City of Indianapolis.

overruled the demurrers of Lilly and Fortune, and they each excepted. The demurrers of the Commercial Club, and the other defendants were sustained, and judgment was rendered in favor of all the last-mentioned defendants against the city on their demurrers to the complaint. The defendants Fortune and Lilly each filed their separate answers to the complaint in five paragraphs, setting up affirmative matter as a defense. The plaintiff demurred to each paragraph of these answers, which demurrers the court sustained, over the exceptions of said defendants. Subsequently, upon the complaint of Lilly and Fortune, the court ordered that the Commercial Club be again made a party to the action, and be required to interplead with the city of Indianapolis in respect to the claim which the latter made against Lilly and Fortune for the recovery of the money, as in the complaint set up and alleged. In obedience to this order of the court, the Commercial Club appeared by its attorneys, and filed a cross-complaint, making the city of Indianapolis, Lilly, and Fortune parties defendant thereto, and the club asserted in its cross-complaint the right to recover the money from Lilly and Fortune claimed by the city. The city of Indianapolis and Fortune and Lilly separately demurred to the cross-complaint for insufficiency of facts, and these demurrers were sustained; and, said club electing to stand by its cross-complaint, judgment was rendered against it in favor of each of the demurrants. Thereafter Fortune and Lilly both refused to plead further, and each elected to abide by his answer, thereupon the court rendered its judgment against them in favor of the city of Indianapolis for \$5,537.50, being the principal and interest of the money, to wit, \$5,000.00, which the plaintiff alleged these defendants had wrongfully converted. From this judgment Lilly and

Lilly et al. v. The City of Indianapolis.

Fortune have appealed to this court, and their separate assignment of errors are based on the rulings of the court in holding the complaint sufficient on demurrer as against them, and in sustaining the demurrers of the appellee, the city of Indianapolis, to their separate answers. The Commercial Club has also assigned cross-errors, based on the court's action in sustaining the demurrers of the appellants Lilly and Fortune, and that of the city of Indianapolis, to its cross-complaint, and it prays that the judgment rendered against it in favor of these parties be reversed. Appellants Lilly and Fortune each contend that the complaint is not sufficient in facts to warrant the judgment rendered against them in favor of the appellee. The complaint is quite lengthy and is replete with copies of papers and documents filed with, and designed to be made parts thereof. The following are substantially the essential facts as disclosed by the complaint and its exhibits: The appellee, city of Indianapolis, is a municipal corporation, and the Commercial Club is a private incorporated body, situated in said city, and its primary object is to promote the business and commercial interests of such city. During the years 1892, 1893, and 1894, appellant Eli Lilly was the president of this club, and his co-appellant, William Fortune, was its secretary. It appears that through the efforts made and steps taken by this club, the Grand Army of the Republic was induced to select the city of Indianapolis as the place for holding its national encampment in 1893. Among the several standing committees of the said Commercial Club, was one which was denominated and styled the "Committee on Assemblages," and it was charged with the duty of securing political parties and other organizations to hold their various conventions or meetings at the city of Indianapolis,

Lilly et al. v. The City of Indianapolis.

and it was authorized to take the necessary steps to provide for the holding of such conventions, and for the entertainment of the visitors and members attending the same. By reason of the committee on assemblages being charged with this duty, it appears to have taken the initiatory steps in regard to formulating plans and measures designed to carry into effect the entertainment of the visitors and the members of the Grand Army Encampment during the time of its session at said city. Consequently, in September, 1892, this committee adopted a resolution requesting the appellant Lilly to become the chairman of a citizens' executive committee, which it was designed should assume the responsibility of carrying out the means and measures provided relative to said encampment. In pursuance of this request, Lilly seems to have formulated a general plan for an organization of the citizens of the city, and on the 12th day of December, 1892, his plan or scheme pertaining to such purpose was submitted to a mass meeting composed of citizens of Indianapolis, and the plan prepared by him was approved and adopted by said meeting, and an executive board or committee was created, and its officers were to consist of a chairman, vice chairman, executive director, secretary, and treasurer. Lilly was selected as its chairman, Fortune as executive director, and Albert Gall as its treasurer. Other committees were appointed, among which was one on finance, and another on legislative matters, etc. Prior to November 1, 1891, the Commercial Club's committee on assemblages had received from subscriptions on the part of citizens certain sums of money donated as a fund to aid it in its proposed work, and after that date it received additional subscriptions to its fund. Ten per cent. of the latter was payable without any conditions, and the remainder

Lilly *et al.* v. The City of Indianapolis.

was payable contingently in the event that either the National Convention of the Democratic party, in 1892, or the G. A. R. Encampment of 1893, be held at Indianapolis. Subsequently, a third subscription to the fund of the assemblage committee was obtained, which was to be applied to the expenses of the Twenty-seventh National Encampment of the G. A. R., to be held in Indianapolis in September, 1893. The complaint alleges that the total sum collected and received by the Commercial Club, through its committee on assemblages, upon these several subscriptions, amounted to over \$50,000.00, of which \$22,396.22 was paid and collected on the two last-mentioned subscriptions. On March 20, 1893, the common council of the city of Indianapolis, having been invested with special authority by the legislature to that effect, adopted an ordinance, which was approved by the mayor, whereby \$75,000.00 was appropriated out of the money in the treasury of the city for the purpose of defraying the *legitimate expenses* arising out of the preparation for the reception and entertainment of the Twenty-seventh National Encampment of the Grand Army, and it was provided in the ordinance that the money so appropriated was to be paid out of the city treasury on warrants drawn by the city comptroller in favor of a committee composed of seven citizens, denominated the "Encampment Committee," which committee the ordinance created, and designated the persons who were to constitute the same; these being the defendants heretofore mentioned. This committee was vested with the power of disbursing the money appropriated by the city under this ordinance, and was charged with the duty of taking vouchers, showing the purpose to which it was applied. It is alleged in the complaint that, before the adoption of this ordinance, at a meeting of the finance

Lilly et al. v. The City of Indianapolis.

committee of the common council, appellants, Lilly and Fortune, as president and secretary of the Commercial Club, and as chairman and executive director of the citizens executive board, appeared before said finance committee, and stated to its members in substance, that it would be impossible to secure by private subscriptions a sum sufficient for the payment of the expenses of the encampment, and that the city ought to make an appropriation; that if it would do so, no part of such appropriation would be used or drawn upon for the encampment expenses until the whole amount subscribed or to be subscribed to the fund of the committee on assemblages had been exhausted; and that the city's appropriation should only be drawn upon to make up any deficiency existing after said committee's fund had been exhausted; and further stated to said committee that, in the event the city made an appropriation, after all of the expenses of the encampment had been paid, any unexpended balance of the fund appropriated by the city or of the funds subscribed to the assemblage committee, together with the proceeds arising out of the sale of lumber or other materials, would be turned into the treasury of the city. It is alleged that, but for these statements and promises so made by the defendants Lilly and Fortune to this finance committee, the latter would have reported the ordinance back to the council with the recommendation that it be not passed, and no appropriation would have been made by the city. That, after these statements were made by Lilly and Fortune to said committee, it adjourned without any action, and thereafter it reported the ordinance back to the common council, without making any recommendation in regard to it, and it was, after being amended in some particulars, passed by the common council. The further averment is made that the coun-

Lilly et al. v. The City of Indianapolis.

cil intended that the money appropriated by the ordinance should be supplementary to the subscription fund of the assemblage committee. Of the amount appropriated by the city under the ordinance, the encampment committee at different times received from the city treasury sums of money aggregating \$35,000.00. It appears that this committee, instead of disbursing the money received by it from the city, finally decided that it would be less trouble and expense to turn over the money to the treasurer of the citizens' executive committee upon requisition of its chairman, and it formulated, for the purpose of transferring the money from its hands to said treasurer, to be used by Lilly as chairman of the executive board in making requisitions on the encampment committee, for the money, a blank form of which the following is a copy: "Indianapolis, Ind., —, 1893. To Mr. —, Chairman Encampment Committee. Dear Sir:—Out of seventy-five thousand dollars appropriated by the city of Indianapolis, * * * * please pay — dollars to Albert Gall, treasurer of the citizens' executive board in charge of the arrangements for the entertainment of said encampment, who will receipt therefor to you, and the disbursement of which, under my authority as chairman of the citizens' executive board, Twenty-seventh Encampment, G. A. R., I agree and pledge myself shall be only for legitimate expenses attending the preparation for the reception and entertainment of soldiers, sailors and marines attending said encampment; any unexpended balance of funds remaining in the hands of said treasurer after the settlement of all bills to be paid over to you by him for the purpose of turning it over into the city treasury. [Signed.] Eli Lilly, Chairman Citizens' Executive Board."

The following is the form of a receipt executed by

Lilly et al. v. The City of Indianapolis.

Gall when he received the money from the chairman of the encampment committee: "Received the above requested _____ from Mr. _____, chairman of the encampment committee, to whom I pledge myself to deliver at his request vouchers of all disbursements of this money. [Signed.] Albert Gall, Treasurer Citizens' Executive Board."

Appellant Lilly, it appears, as chairman of the executive board, by six requisitions of the above character, made by him at different times, and for different sums, transferred from the encampment committee into the hands of the treasurer of the citizens' executive board, the sum of \$35,000.00, and no more, of the money appropriated by the city of Indianapolis. This money was kept by Gall, the treasurer, as a separate and distinct fund, as was likewise the money received by him from the subscriptions to the committee on assemblages. It is shown that of this amount of the city's funds placed in the hands of Gall, the sum of \$34,415.25 was disbursed by him on proper orders, and paid out in satisfaction of the indebtedness of the encampment, for which disbursements he turned over vouchers to the encampment committee. After this disbursement there remained in the hands of Gall of the money received by him from the city's appropriation an unexpended balance of \$584.75. This sum, together with \$2,061.81 of the money said to have belonged to the citizens' executive board, amounting in all to \$2,646.56, was paid into the treasury of the city of Indianapolis, leaving the net disbursement made from its funds to be \$32,353.44. The complaint further alleges that the encampment committee did draw from the amount appropriated by the city \$17,000.00 more than was needed for the legitimate expenses of said encampment for the following reasons: "That by action of said club, its assemblage

Lilly et al. v. The City of Indianapolis.

committee, said mass meeting, and the plan adopted by said encampment committee, as set forth in their said report, all as hereinbefore set forth, all of said subscription funds and said appropriation were made available for the expenses of the encampment upon requisition of said Lilly as chairman of the said executive board. That upon requisition from said Lilly as such chairman sums were transferred at his pleasure and discretion from said subscription fund to the credit of said committee on assemblages, and paid to the said Albert Gall as treasurer of said executive board; and in like manner, upon like requisitions upon said encampment committee, the said funds so appropriated by the city were, from time to time, paid over by said, last-named committee to said Gall as such treasurer, and through him said moneys were disbursed and paid out on encampment expenses upon the authority of said Lilly and Fortune as chairman and executive director of said executive board. Said encampment committee, upon requisitions and receipts as per form set forth in his report, so paid over to said Gall, treasurer, said sum of thirty-five thousand (\$35,000.00) dollars so drawn by it from the city, and the same was disbursed as appears by the said committee reports and vouchers. Said requisitions were so drawn upon such respective funds and committees by said Lilly as chairman, and disbursed by said Gall as said treasurer, by the warrant and authority of said Lilly and Fortune as such chairman and executive director, respectively. That when all the legitimate expenses of the encampment committee had been paid, there remained a balance in the treasury of said club to the credit of said committee on assemblages the sum of twelve thousand (\$12,000.00) dollars, wrongfully withheld and unexpended for encamp-

Lilly et al. v. The City of Indianapolis.

ment expenses, contrary to the express representations, promises, and agreements to the said finance committee of the common council hereinbefore set forth, and of the sums which had been so transferred to said Gall, treasurer, from said subscription fund of the said assemblage committee, upon the authority and warrant of said Lilly and Fortune, there was paid to said Fortune the sum of five thousand (\$5,000.00) dollars for services as executive director, which sum of five thousand dollars (\$5,000.00) so paid was not a legitimate item of expense of said encampment, in that said services of said Fortune as executive director were voluntary and were fully rendered at the time of such payment, and without previous contract express or implied, that he receive compensation for such services, except in so far as such services were rendered by him as secretary of said club; and for such services the said Fortune was paid by said club a salary of three thousand (\$3,000.00) dollars annually therefor. That by such unauthorized and wrongful payment to said Fortune the balance remaining in the custody of said Gall, treasurer, after payment of all legitimate expenses, was reduced in the sum of five thousand (\$5,000.00) dollars, and was less by that sum than it should have been after payment of all legitimate expenses. That by the terms and conditions of the agreement entered into by the said encampment committee and said Lilly as chairman of said executive board, and by the terms and conditions of the requisitions of said chairman upon said encampment committee, as set forth in said committee's reports hereinbefore set forth, any unexpended balance of funds remaining in the hands of said Gall, as treasurer, after settlement of all bills, it was agreed and stipulated should be paid over to said encampment committee for the purpose of turning it into the city treasury.

That, except for said wrongful and unauthorized payment to said Fortune, said balance, after payment of all bills, remaining with said Gall, would have been five thousand (\$5,000.00) dollars more than it actually was, and said encampment committee would have received five thousand (\$5,000.00) dollars more from said Gall, treasurer, than it did, and would have paid back five thousand (\$5,000.00) dollars more to the city than it did. That by this wrongful withholding from the application of said subscription fund to the payment of the legitimate encampment expenses, as above set forth, and the wrongful payment to said Fortune of said sum of five thousand (\$5,000.00) dollars, the city's said appropriation was wrongfully and illegally drawn upon in the sum of seventeen thousand (\$17,000.00) dollars, to its damage and loss in said sum. That by reason of the premises said encampment committee has committed a breach of its trust, in that it drew from said funds so appropriated a sum of seventeen thousand (\$17,000.00) dollars more than was needed to supplement said subscription fund in payment of legitimate encampment expenses. That said sum of seventeen thousand (\$17,000.00) dollars was wrongfully withheld and misappropriated, and the defendant, the Commercial Club of Indianapolis, still withholds twelve thousand (\$12,000.00) thereof, which it has converted to its own use, and said Fortune still holds and has converted to his own use said sum of (\$5,000.00) dollars thereof." It is further averred that all of said funds were trust funds, as the defendants well knew, and they have been wrongfully diverted from the uses and trust for which they were appropriated with the full knowledge and consent of the defendants. The prayer is for an accounting, and for a judgment as heretofore stated.

The first question presented for determination is, do

Lilly et al. v. The City of Indianapolis.

the facts embraced in the complaint make a showing sufficient to entitle the appellee, the City of Indianapolis, to demand that appellants, Lilly and Fortune, account for, and pay over to it, the \$5,000.00, which amount, it is alleged, was by them wrongfully converted? Appellee, to recover at all, must do so, on the strength of its own title to the money in controversy, and not by reason of any weakness or infirmity that may exist in the title or right of the appellants to the same. Consequently, unless the facts establish the right or title of appellee to the funds, the wrongful conversion thereof, imputed to appellants, by the complaint, can be of no concern to appellee. There seem to have been three different organizations connected with the matter of the G. A. R. encampment out of which this controversy has arisen: First, the Commercial Club, a private incorporated body, of which appellants were respectively the president and secretary; second, the City of Indianapolis, a municipal corporation; third, an unincorporated body of citizens, who acted through its executive board, of which the appellant Lilly was chairman, and his co-appellant, Fortune, was the executive director. The Commercial Club had a standing committee known as the "Committee on Assemblages," and this committee seems to have had in its possession, or rather standing to its credit, as the representative of the club, money derived from the subscriptions mentioned, a large amount of which had been subscribed under the express stipulation that it was to be applied or used in defraying the expenses of the encampment. The appellee seems to have been represented by her encampment committee, appointed under the provisions of the appropriation ordinance. The facts as averred in the complaint show that the pleading, in its attempt to charge a cause of action against appellants, in

Lilly et al. v. The City of Indianapolis.

favor of the appellee, proceeds upon two theories: First, That the money appropriated by appellee's common council by the ordinance in controversy was to be supplementary to the funds derived from the Commercial Club, and arising out of the subscriptions to its committee on assemblages; and that this latter fund was the primary one out of which the expenses must be paid, and that the money appropriated by the city, could not be drawn upon to pay or discharge any of the encampment expenses until the funds received from the Commercial Club had been exhausted in the payment of such expenses. Second. That under the stipulations contained in the requisition used by Lilly as chairman of the executive board in transferring the money appropriated by the city of Indianapolis from the possession of the encampment committee, into the hands of the treasurer of the executive board, he thereby expressly agreed and contracted with the encampment committee that any and all unexpended funds in the hands of such treasurer, derived from all sources, after the payment and satisfaction of all of the legitimate expenses growing out of the holding of the encampment, should be turned over to said encampment committee for the purpose of being paid by it into the city treasury. The first theory apparently involved or had reference to the entire sum of \$17,000.00 remaining as an unexpended balance to the credit of the Commercial Club's committee on assemblages before the \$5,000.00 forming a part of that amount had been turned over to the treasurer of the executive board, and which subsequently was paid to appellant Fortune, on the order of Lilly. But in reality the appellee, under this theory, it would seem, only asserted its claim to the \$12,000.00 which remained after the \$5,000.00 had been turned over to the treasurer of said board. The second theory apparently embraced,

Lilly et al. v. The City of Indianapolis.

or had reference only to the \$5,000.00 which had been placed in the hands of the treasurer of the executive board, and was an unexpended balance in his hands after all of the legitimate expenses of the encampment had been paid. The insistence of appellee upon the second theory is that, under the facts, this money belonged to it, and, as all of the legitimate encampment expenses had been paid, and inasmuch as Fortune's claim for services could not be classed as such, the money ought to have been turned over to the city, and the payment of it to the latter upon the order of his co-appellants was a wrongful conversion, for which the appellants should account to the appellee. The learned counsel for the appellee, in his brief, on this question says: "Under the agreement made by Lilly in his requisition for the city's money, it was understood that any balance of funds in the treasurer's hands should be returned to the city. Knowing this, and with this knowledge, he transferred \$5,000.00 from the treasury of the Commercial Club to treasurer Gall, and put the \$5,000.00 where it must be paid to the city of Indianapolis, as an unexpended balance of funds, if not used for legitimate expenses of the encampment." The trial court, it appears, decided adversely to appellee's contention upon the first theory of the complaint, and, in our opinion, rightfully adjudged that it was not entitled to the \$12,000.00; but held in appellee's favor on the second theory, and decided that it was entitled to recover the amount alleged to have been wrongfully converted to the use of Fortune.

The court accepted the contention of counsel for appellee upon the second theory of the complaint as tenable, and, as it appeared that Lilly had transferred the \$5,000.00 from the treasury of the Commercial Club to the treasury of the executive board, and as all

Lilly et al. v. The City of Indianapolis.

of the legitimate expenses of the encampment had been liquidated, the money in question must therefore be considered as an unexpended balance, and, under the stipulations in the requisitions heretofore set out, ought to have been turned into the treasury of the city of Indianapolis. Passing to the question for our determination, it is evident, in the light of the facts as we view them, that while it may be said that the fund arising out of appellee's contribution, and also the one derived from the private subscriptions to the committee on assemblages, were each dedicated to a common purpose, still each of these funds was separate and distinct, neither depending to any extent upon the other. There are no facts to justify the contention of counsel for appellee that the fund created by the latter's donation ought to be considered as one only to be drawn upon or used to supply a deficiency to meet the encampment expenses that might exist in the fund, arising out of the private subscriptions to the committee on assemblages. The statute on which the appropriation ordinance is founded simply empowered the common council of the city of Indianapolis to appropriate by an ordinance any sum not exceeding \$75,000.00, for the legitimate expenses attending the preparation, etc., of the Twenty-seventh National Encampment of the Grand Army of the Republic to be held at or near Indianapolis. Acts 1893, p. 54. The statute further provides that the sum so appropriated may, by such ordinance, be made payable to any person or persons named therein, to be disbursed by them for said purpose, and accounted for under such regulations as such ordinance may prescribe. The ordinance, which is made an exhibit, makes no reference whatever to any other fund that may be donated, and in no manner indicates that the money appropriated thereunder must be used to

Lilly et al. v. The City of Indianapolis.

supply a deficiency on the part of any other fund which might be assigned or set apart for the same purpose. It ordains that the sum of \$75,000.00 be appropriated out of the funds of the treasury of the city of Indianapolis for the purpose of defraying the legitimate expenses of the encampment therein named. It then designates or names seven persons, who are to compose what is denominated the "Encampment Committee," and directs the city comptroller to draw warrants on the city treasurer in favor of this committee for the entire sum donated, providing, however, more specifically, that said official "shall from time to time draw his warrant on the treasurer in favor of said committee in such sums as the needs of the committee shall require." The ordinance invested this committee with the power of disbursing the money appropriated, and imposed on it the duty to take vouchers for all money paid out, showing the purpose for which it was paid, and to file the same with a report of all its doings with the city comptroller. Counsel for appellee place some stress in support of the first theory of the complaint on the averments that appellants appeared before the finance committee of the common council, and made statements substantially to the effect that the city ought to make an appropriation, and, if it would do so, they agreed that no part of the money so donated would be drawn upon until the fund contributed to the Commercial Club's committee on assemblages was exhausted. It does not even appear that the common council, before it passed the appropriating ordinance, was informed in regard to these statements. In fact, it is disclosed by the complaint that the finance committee reported the ordinance back to the council without any recommendation whatever, and, for aught appearing, the incentive which

Lilly *et al.* v. The City of Indianapolis.

prompted the council to adopt it was for the reason it considered that the money donated thereby to the purpose in view would ultimately conduce to the best interests of the people of the city of Indianapolis. The ordinance, in plain terms, speaks for itself, and may be said to be solely a legislative act of the common council; therefore a judicial search for the motives which actuated that body in its enactment can not be instituted, and the contention of counsel for appellee that these statements made by appellants to the finance committee were what moved the council to pass the ordinance are not in any manner available in support of the alleged cause of action. The rule is well affirmed that courts will not institute an inquiry into the motives of the legislative department in the enactment of laws. *Wright v. Defrees*, 8 Ind. 298; *McCulloch v. State*, 11 Ind. 424; *Judah v. Trustees of Vincennes University*, 16 Ind. 56. This rule is as applicable to legislative acts of municipal corporations as it is to those of the State's legislature. 1 *Dillon Munic. Corp.*, section 311; *Beach on Pub. Corp.*, section 516.

It is evident, we think, under the circumstances in this case, the statements in controversy, are in no sense legitimately entitled to any consideration in support of either of the theories advanced by the complaint. There are no facts which can be said to uphold any claim or title of the appellee to the \$17,000.00, or any part thereof, which remained unexpended in the treasury of the Commercial Club, standing to the credit of its committee on assemblages, and out of which the amount in controversy under the second theory of the complaint was carved, and transferred to the treasury of the executive committee, and then paid over to Fortune.

Appellee insists that the amount in controversy of

Lilly et al. v. The City of Indianapolis.

the money credited to the Commercial Club's committee on assemblages, having been placed in the treasury of the executive board by order of Lilly as chairman of the latter, and being there after all of the expenses of the encampment had been settled, became an unexpended balance, intended to be included in the stipulations of the requisitions signed by Lilly, whereby the money contributed by appellee was transferred from its encampment committee to the treasury of the executive board, and therefore, under the agreement between the encampment committee and Lilly, as chairman of the executive board, as constituted by these stipulations, the money became the property of the city, and ought to have been turned into its treasury. If this contention can be decided adversely to appellee, it is manifest that the question at issue between the parties is closed, for, in that event, appellants owe no duty to account to the former for the money alleged to have been misappropriated. It will be remembered that the facts show that all of the unexpended balance of the money donated by the appellee, and \$2,000.00 and over in addition, were paid over to the treasurer of the city. The contention of counsel for appellee that the pledge of appellant Lilly, given in the requisition, obligated him to account for and pay over to the city not only the balance of its funds, but also embraced and bound him to turn over in like manner to the city, as its own money, all of the unexpended balance of the fund in the treasury of the executive board standing to the credit of the Commercial Club, is certainly not tenable. In order properly to interpret and ascertain what fund the agreement under the stipulations in the requisition referred to, and was intended to include, an examination of the facts which lead up to the drafting or formulation of the requisition will be helpful. It

Lilly et al. v. The City of Indianapolis.

appears from the official report made by the encampment committee in compliance with the ordinance, which report is made an exhibit herein, that at the first meeting of this committee a subcommittee was appointed from its members to consider and recommend some method by which the money appropriated by the city should be disbursed. It seems that the only question referred to the consideration of this subcommittee was that relating to the disbursement of the city's contribution. The subcommittee, after advising with the city attorney and comptroller recommended to the committee as a whole that the money be disbursed through the treasury of the executive board, and with this report it appears that the form of the requisition to be used by Lilly, being the one in question, was submitted, together with the method proposed for the disbursement of the money; and this report, together with this form of requisition, was approved and adopted by the encampment committee as an entirety. This action of the committee would indicate that there was no intention to exact from Lilly as chairman of the executive board anything more than a pledge that the money in the hands of the encampment committee upon which he made his requisition, under the arrangements, should be applied to the legitimate expenses of the encampment, and that the unexpended balance thereof remaining in the treasury of said board after such expenses had been liquidated should be turned back to the treasury of the city. The phrase "unexpended balance of funds" under the circumstances, when construed with and read in the light of the entire instrument in which it is contained, can be construed to mean and refer only to the unexpended balance of the money contributed by appellee. This was the only fund to which the requisition, by its express terms, professed to

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...of the law, and the law is perfectly applicable. ...the attention of the ...chairman of the ...that the money ...board belonging to ...the property of ...the reason ...Lilly ...agreement or ...provision, professed ...the executive board, ...dispose of any of ...turning it over to ...this right under ...than he could ...the money ...the club. Neither ...committee is shown to ...with any authority to enter ...which would affect the rights or ...the unexpended bal- ...the expense growing ...had been paid. The or- ...under which the ...and it imposed upon ...other fund than that ...and this was the only ...committee was entrusted. Upon ...the facts it is evident ...the committee ...the expenses of the encamp- ...with a trust for that pur- ...the money contributed by appellee, and, if the latter could not be diverted from the common purpose to which both funds were dedicated, certainly the former, under the circumstances, must be con-

Lilly et al. v. The City of Indianapolis.

trolled by the same rule. But we need not further consider the question, for, when the facts set out in the complaint are read in the light of legal principles of universal recognition, it is clear that they do not sustain appellee's claim or title in the first instance to the money in controversy, and it therefore must fail in its demand that appellants be required to account to it for the alleged wrongful conversion thereof, consequently the demurrers of appellants to the complaint ought to have been sustained. An examination of the facts set up in the cross-complaint of the Commercial Club, on the face of the pleadings, establish its right to the money in dispute, and show that the claim thereto asserted by the city of Indianapolis is wholly unfounded. The demurrer of appellants and appellee to the cross-complaint ought to have been overruled. As to the right of appellant Fortune to retain, in whole or in part, the money received by him, over the claim of the cross-complainant, we do not decide. As to whether he is entitled to be reasonably remunerated for the services rendered under a contract, either express or implied, is a matter which ultimately must be determined under the issues joined under the cross-complaint. Fortune, apparently, however, was acting, in rendering the service for which he claims compensation, not merely as the secretary of the Commercial Club, but as the executive director of the citizens' executive committee, consequently the fact that he may have been at the same time under a salary for serving the Commercial Club as its secretary would not alone defeat him in his claim for compensation.

For the reason stated, the judgment in favor of appellee and against appellants, and also the judgment in favor of appellants and appellee against the Commercial Club, are each reversed, and the cause is

Peck v. The City of Michigan City.

ordered to be remanded to the lower court, with directions to sustain each of the demurrers of appellants to the complaint, and to overrule each of the demurrers of appellants and appellee to the cross-complaint.

PECK v. THE CITY OF MICHIGAN CITY.

[No. 18,186. Filed March 9, 1898.]

149 670
155 480

MUNICIPAL CORPORATIONS.—*Sewers.*—*Damages for Negligent Construction.*—If deposits from a sewer constructed and maintained by a city cause a peculiar injury to the owner of docks, by preventing or materially interfering with the accustomed and lawful use of such docks, the city is liable in damages. *pp. 671-682.*

NUISANCE.—*Limitation of Action.*—Where a nuisance is of a character so permanent that it may fairly be said that the entire damage accrues in the first instance, the statute of limitation begins to run at this time. On the other hand, where the nuisance is a continuing source of injury, there is a continuing right of action. *pp. 682-684.*

From the LaPorte Circuit Court. *Reversed.*

J. F. Gallaher, C. R. Collins and J. B. Collins, for appellant.

W. H. Breece, for appellee.

HACKNEY, J.—This suit was by the appellant, in three paragraphs of complaint. To the first paragraph appellee's demurrer was sustained, and to the second and third paragraphs demurrers were overruled and answers filed, and to said answers demurrers were overruled. Said several rulings are here assigned as error.

Each of the paragraphs of complaint alleged that appellant owned real estate fronting upon the basin of the harbor at the city of Michigan City and maintained docks for the loading and unloading of merchandise to and from the water craft doing business at said city, said business constituting the principal source of value to said property; that in the year 1883

Peck v. The City of Michigan City.

the city had constructed an extensive system of sewers for the drainage and sewerage of said city, the main sewer emptying into said basin near to the appellant's property; that said system of sewers carried and emptied into said basin continually large quantities of sewage and of sand from the surface drainage of said city, so filling said basin at the point where his docks were maintained; that the water became too shallow to admit water craft to approach his docks; that the sewage collected at the mouth of said sewer, becoming so foul and offensive as not only to make it disagreeable and offensive for persons to approach his docks with water craft, but to make it offensive to persons to conduct business upon his docks and upon his premises; and that by reason thereof his premises were rendered valueless, to his damage in the sum of \$5,000.00.

In each of the second and third paragraphs of complaint it was alleged generally that the appellee had been negligent in the plans and construction of said sewer, in emptying it at said point, the stream in said harbor being sluggish and insufficient to carry away the deposits from said sewer; also, in not removing from the mouth thereof the sand and sewage so emptied, and in collecting said sewage at said point without furnishing any outlet therefor.

The third paragraph alleged that the damage to his property had accrued since the year 1890. All of the paragraphs sought damages and the first sought also to enjoin the further discharge of sand and sewage into said basin. The answers were that the causes of action did not accrue within six years.

It is a general proposition, which we think applicable to the first paragraph of complaint, that, in the construction of sewers and other public works authorized by law, cities are liable for consequential injuries resulting from negligence only. *City of Richmond*

Peck v. The City of Michigan City.

v. Test, 18 Ind. App. 482; *City of Terre Haute v. Hudson*, 112 Ind. 542; *Rice v. City of Evansville*, 108 Ind. 7; *City of Evansville v. Decker*, 84 Ind. 325; *Cummins v. City of Seymour*, 79 Ind. 491; *Weis v. City of Madison*, 75 Ind. 241; *Macy v. City of Indianapolis*, 17 Ind. 267.

Said first paragraph does not proceed upon the theory of negligence, and does not seek to require the removal of the obstruction to the uses of the docks, but seeks to enjoin the use of the basin as a place to discharge sewage. The gist of any cause of action, under the facts pleaded, there being no negligence in plan or construction, must be in not caring for the sewage, when discharged into the basin, so as not to create and continue a nuisance, as we shall show hereafter.

The sufficiency of the second and third paragraphs of complaint is not presented. Each of said paragraphs proceeds upon the theory that the appellee, by her negligence, created a nuisance affecting the value of the appellant's property. Were the answers of the statute of limitations available? The argument proceeds upon the question as to whether the cause of action accrued from the time of the act resulting in the alleged nuisance, the construction of the sewer, or from the time of the injury sustained.

Conceding, as we must, from the absence of any question, the sufficiency of the second and third paragraphs of complaint, the cause of action relied upon in each is that by negligence the city has created and maintains a nuisance which directly affects public navigation and the appellant's enjoyment of his private property. If the complaint makes out this cause of action, it may be maintained upon authority. *Franklin Wharf Co. v. City of Portland*, 67 Me. 46, 24 Am. Rep. 1; *Brayton v. City of Fall River*, 113

Peck v. The City of Michigan City.

Mass. 218, 18 Am. Rep. 470; *Richardson v. City of Boston*, 19 How. (U. S.) 263, 270; *Haskell v. City of New Bedford*, 108 Mass. 208; *Barron v. Mayor, etc.*, 2 Am. Jurist, p. 203; 2 Dillon's Munic. Corp. (4th ed.), p. 1330, note; 2 Dillop's Munic. Corp. (4th ed.), sections 1047, 1048, 1051 and 1051a; Beach on Public Corporations, section 760; Harrison's Munic. Manual, p. 400; Tiedman on Munic. Corp., section 355; *State v. City of Portland*, 74 Me. 268. We must, therefore, look to the character of the liability and of the remedy, to ascertain whether they are of the class against which the statutes of limitation are directed.

In the first of the above-cited cases, a case in all respects like the present, the liability is clearly shown. The rights and duties of the city, the general public, and the private property owners are there given as follows: "The right to build the sewer and outlet implies the right to use them for the purposes for which they were intended, to wit, for the collection and discharge of the debris of that part of the city, where they should be constructed, into the dock below low water mark. But it is to be borne in mind that the right to do this being in contravention of the right of the public, at common law, to use the sea as a public highway, should be construed strictly and made to harmonize, as nearly as may be, with this paramount right of the public; for we do not, by any means, assent to the proposition of the counsel for the defendants that the right of navigation is subordinate to the right of sewerage. No authority has been cited to sustain that position, nor is it reconcilable with the well established doctrine of the common law. The public right to the navigation of the sea is not qualified or limited, at common law, by any private or municipal right of sewerage. 'It is an unquestionable

Peck v. The City of Michigan City.

principle of common law,' say the court, in *Arundel v. McCulloch*, 10 Mass. 70, 'that all navigable waters belong to the sovereign or, in other words, to the public, and that no individual or corporation can appropriate them to their own use, or confine or obstruct them so as to impair the passage over them, without authority from the legislative power.' So in *Commonwealth v. Charlestown*, 1 Pick. 180, Parker, C. J., says: 'There can be no doubt that, by the principles of the common law, as well as by the immemorial usage of this government, all navigable waters are public property for the use of all the citizens; and that there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them.' The same doctrine has been repeatedly held and applied in this state to tide water and navigable streams. In *Gerrish v. Brown*, 51 Me. 256, it was held that navigable rivers are public highways, and that if any person obstruct such a river by carting therein waste material, filth, or trash, or by depositing material of any description except as connected with the reasonable use of such river as a highway, or by direct authority of law, he does it at his peril, and is guilty of creating a public nuisance. The statute under which the defendants built the sewer and outlet is not to be construed, therefore, as authorizing an unnecessary infringement of existing rights and privileges; but it is to have such a construction that the wharf company shall be no further limited or restricted in these respects than may be reasonably necessary to accomplish the purpose of the statutes; and it is the duty of the defendants to exercise the power thus conferred in accordance with this rule. *State v. Freeport*, 43 Me. 198, 202; *Newburyport Turnpike v. Eastern Railroad*, 23 Pick. 326. The city has the right to use the sewer, and the wharf company the right of naviga-

Peck v. The City of Michigan City.

tion and the use of their wharf. These respective rights are to be reasonably enjoyed. Neither party can destroy, or unreasonably and unnecessarily impair the rights and privileges of the other. The purpose of the defendant's erection under the statute is substantially accomplished by the discharge of the deposits at the outlet of the sewer. It cannot be presumed or implied that the statute contemplated the erection of a public nuisance below low water mark, by allowing the deposits from the outlet of the sewer to accumulate and remain there in such quantities as to menace the public health, obstruct navigation and seriously to impair, if not entirely to destroy, the plaintiff's erections, previously made under an act of the legislature of equal authority with that under which the defendants made their erection. Nor is it reasonable to conclude that the grant under which the plaintiffs extended their wharf into tide waters, implies the right thereby to create a public or private nuisance either in the manner of using their wharf or by its disuse and allowing it to go to decay. The purpose of the legislative grant to the wharf company was not to destroy or obstruct navigation and commerce but to facilitate them. So the purpose of the statute under which the city acted was not to authorize it to transfer a nuisance from the city to low water mark, or to create one there, but to enable it to conduct the rubbish and impurities from a particular portion of the city to a point in the sea where they would ordinarily be so distributed and dissipated as not to create a nuisance. If, however, this result is not produced either by reason of the action of the elements or from some other cause than the fault of the plaintiffs, it is the duty of the city to remove those deposits within a reasonable time and in such a manner as to prevent their becoming a nuisance to the public or a private

Peck v. The City of Michigan City.

nuisance to the wharf company. The right of the defendants to construct an outfall for the sewer in the sea does not include the right to create a nuisance, public or private; it is a right to make deposits temporarily, and not a right to obstruct navigation permanently."

In *Brayton v. City of Fall River, supra*, the question was as to the rights of the city to conduct sewage into docks so as to lessen the depth of the water and prevent the landing of cargoes at the wharf, and as to the liability for so doing. It was said: "The defendants had the right to make these sewers or drains, and to discharge them into the sea. But this right is subject to some limitations. It does not include the right to create a nuisance, public or private. If the sewers or drains are so built or managed as to create a public nuisance, the defendants are indictable; if a private nuisance is created, they are answerable in damages to the person injured."

In the old case of *Barron v. Mayor, etc., supra*, the question was as to the right of the city of Baltimore, for the purpose of drainage, to conduct certain streams into the docks of the appellants, thereby causing large quantities of sand, earth, etc., to be deposited near the appellant's wharf, lessening the depth of the water and impairing the access to the wharf. In the full and able discussion of the rights of the parties by Archer, C. J., it was said: "If it was a measure necessary to be done for the public benefit of the inhabitants of Baltimore, and the natural and necessary consequence of the measure has been the permanent injury and sacrifice of the plaintiff's property, justice seems to demand that he whose property has fallen a victim to the public service should be compensated in some way. And if he do not succeed, it must be admitted that the most striking and apparent justice

Peck v. The City of Michigan City.

must yield before some unbending technical principle, or some fancied theory of public policy. It must moreover be admitted that justice would seem to demand that the compensation should proceed from the quarter to which the benefit flows. I cannot permit myself to doubt but that the character of the plaintiff's rights were such that he might well complain of an injury to them. He had the right which every man has to the benefits flowing from a navigable stream contiguous to his land. He had a right to pass and repass with his vessels. No man had a right to moor a vessel to his lands without his consent; and if he were in the habit of demanding and receiving a compensation from owners of vessels for such consent, and has been deprived of this benefit and profit by the filling up of the navigable stream opposite to his lands, he has been deprived of an important privilege, and been compelled to surrender it for the public benefit. He has been disseized, or, more properly speaking, deprived of an easement appurtenant to his land, which constituted a great portion of its value. And it would be in vain to guard with such vigilance the freehold itself, if the liberties and privileges appurtenant to it were not also the subject of constitutional guardianship. Over the soil covered by the water, over the water itself, which belong to the state, I need not say he had no right; but he had a perfect right, as he had to the soil of the wharf itself, to the profits growing out of the depth of the navigable water attached to it, which was incident to the grant of the soil itself. * * * The city corporation, the inhabitants of the city, will always be willing to pay for that which their general advantage, and benefit, and prosperity may require to be done; and they ought to pay for it. There is no principle which would bind the individual sufferer to bear the whole burthen of any

Peck v. The City of Michigan City.

public improvement. The law cannot be so unjust as to produce such a consequence. I will not say that there may not be some cases which the public interest and the policy of the country might demand should not be heard in the courts of justice, and in which the maxim, *Salus populi est suprema lex* [The welfare of the public is the supreme law.], must prevail, as in the cases of war and public danger. It may be necessary to demolish a house for offense or defense. It may be necessary for a general to enter the lands of a citizen in pursuit of an enemy, or to erect a fortification thereon to prevent his incursions; to march over extensive districts and constantly over private estates in repelling an invasion. These are cases of uncontrollable necessity, and of pressing public emergency.

* * * This might be a case, too, in which it might be decorous in a court of justice, for the public safety, to presume that the legislative authority of the country would yield a proper indemnity. But be the law in such cases as it may, it is sufficient to say that this case is not in principle like any of those which have been mentioned. This is a corporation invested with certain legislative powers for the benefit of all within the sphere of its operation. It guards the health, it promotes internal commerce, by opening convenient highways, and facilitates and preserves external commerce by guarding the navigation of the city. It is a portion of the sovereign power imparted for the benefit of the city, and for its good and orderly government. But although these powers are imparted, they are by no means arbitrary powers, but are subject to the salutary restraints of our constitutions and of such laws as lie at the foundation of all social order, of such as guard individual rights and furnish them inviolable security."

In the case of *Haskell v. City of New Bedford*, *supra*,

Peck v. The City of Michigan City.

of the same character as that now in review, it was said: "One great natural office of the sea and of all running water is to carry off and dissipate, by their perpetual motion and currents, the impurities and offscourings of the land. The owner of any lands bordering upon the sea may lawfully throw refuse matter into it, provided he does not create a nuisance to others. And there can be no doubt that public bodies and officers, charged by law with the power and duty of constructing and maintaining sewers and drains for the benefit of the public health, have an equal right. * * * But it by no means follows that either the city or any private person has the right to deposit filth upon the sea shore in such quantities as to create a nuisance to health or navigation. If the owner of this dock had himself suffered filth to accumulate therein to such an amount as to create a nuisance prejudicial to the public health, the municipal authorities might perhaps have been authorized to remove such nuisance by filling up the dock, or by proper proceedings as a board of health to have compelled the owner to remove it. * * * And the legislature might doubtless by express words or necessary implication, and making due compensation, have authorized any private rights in the dock to be taken for the purpose of suppressing a nuisance. * * * But the right conferred upon the city of New Bedford to lay out common sewers 'through any streets or private lands' does not include the right to create a nuisance, public or private, upon the property of the Commonwealth, or of an individual, within tide water."

In 2 Dillon's Municipal Corporations (4th ed.), section 1047, the author, in discussing this subject, says: "It is, perhaps, impossible to reconcile all of the cases on this subject, and courts of the highest respectability

Peck v. The City of Michigan City.

have held that if the sewer, *whatever its plan*, is so constructed by the municipal authorities as to *cause a positive and direct invasion* of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles, and will have a salutary effect in inducing care on the part of the municipality to prevent such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted. Accordingly, although a municipality having the power to construct drains and sewers may lawfully cause them to be built so as to discharge their refuse matter into the sea, or natural stream of water, yet this right must be so exercised as not to create a nuisance public or private. If a public nuisance is created, the public has a remedy by public prosecution; and any individual who suffers special injury therefrom may recover therefor in a civil action. If, therefore, deposits from sewers constructed by a city cause a peculiar injury to the owner of a wharf or dock, by preventing or materially interfering with the approach of vessels and the accustomed and lawful use of the wharf or dock, the city is liable to the latter in damages."

Again, in section 1051, it is said: "Where such sewers are built and solely controlled by a municipality, many cases, as shown in the sections of the text relating to this subject, have held that the municipality is liable for direct inundations of connecting property with water, filth and sewage, where the sewer, although it may have been built pursuant to a plan adopted by the municipality, is negligently maintained by it after the sewer has been shown by experi-

Peck v. The City of Michigan City.

ence to be insufficient, under ordinary conditions, to prevent such a nuisance and direct injury to the plaintiff's property. In view of the purpose of sewers, their indispensableness to property owners in cities, their vital relation to the public health, the exclusive nature (as the power is usually conferred) of the municipal authorities to construct and to control them, the power and means (where these exist in the municipality) to provide a remedy, and the utter helplessness of the property owner, if no remedy is provided, liability to a private action for negligence is doubtless a salutary rule, and one which in the author's judgment is, under the conditions above stated, and where no contrary legislative intent appears, entirely consistent with legal principles."

And again, in section 1051a, it is said: "In such case the injury to the property owner is manifest. It is caused by the sole act or neglect of the municipal authorities. They alone have the power to remove the cause. The property owner is substantially remediless unless he can quicken and secure corporate action by means of a civil suit for damages. The city as the corporate representative of the fasciculus of local interest which makes sewers a necessity for the benefit of all of the inhabitants of the municipality, is the author of the injury which the plaintiff in the case supposed sustains in the attempt to benefit all. The dictate of justice is that no person should suffer unequally, and, if he does, that all should make compensation. If the city has the power and the means by taxation or otherwise to remedy the defective sewer, and yet, under the conditions above defined and limited, continues such sewer, it must on legal principles be liable, unless it can justify its act or omission by its legislative powers and duties relating thereto. Certain it is that these powers were not

Peck v. The City of Michigan City.

given with any such intent. Under the usual constitutional limitations on legislative action it is at least doubtful whether powers so injurious to, and so destructive of private rights could be directly conferred, and if not, how can they be held to be obliquely granted, or to be embraced in large and general grants of authority? Such delegations of authority are to be construed favorably to the rights of the citizen, and may, we think, reasonably be considered as implying a condition that it shall not be exercised so as to inflict unnecessary or at all events negligent injuries upon private property."

The decisions of this court, first cited in this opinion, affirm the liability of a municipal corporation for negligence in the execution of a proper public work, the drainage of streets, if, in constructing it, large quantities of water are gathered and confined in one channel, without providing an outlet, and from which they flow upon private lands, and injure the owner. If a public work results in a nuisance these holdings support the liability of the corporation.

What, in view of these authorities, is the rule of limitation as to remedies for injuries resulting from a nuisance, such as that here complained of? The sewer was doubtless of a permanent character, but the injury was not committed, nor was it completed at the time the sewer was constructed, nor was the sewer itself the nuisance. The injury now complained of is the result of the discharge of sewage into the basin. The negligence alleged is not alone in constructing the sewer so as to empty into the sluggish current of the harbor, but it is also in continuing to empty the sewage into it without employing any means to remove it or prevent the nuisance resulting.

The rule of law is that no right to maintain a public nuisance arises by prescription, and a continuing

Peck v. The City of Michigan City.

nuisance, with continuously increasing injury, affords a continuing right of action. As said in 16 Am. & Eng. Ency. of Law, p. 988: "If the nuisance is of a character so permanent that it may fairly be said that the entire damage accrues in the first instance, the statute of limitation begins to run from this time. If, on the other hand, the nuisance may be said to continue from day to day, and to create a fresh injury from day to day, there may be a right of action, although the original right of action has been lost by lapse of time." See authorities there cited. By the same authority it is further said, p. 988: "Where the injury inflicted by a nuisance is not of such a character that it can be ascertained, both as to the past and future by a single action, successive actions lie for new damages so long as the nuisance is continued." Many authorities are cited in support of this proposition and little doubt can exist concerning its accuracy.

The rule in *City of North Vernon v. Voegler*, 103 Ind. 314, is distinguished from that applicable here, in that the case was held not to present a cause of action for maintaining a nuisance, but it was there held that a cause of action for damages does not accrue until the wrong or injury has resulted in damage, and *Board, etc., v. Pearson*, 120 Ind. 426, adheres to this rule. See, also, *Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693; *Bonomi v. Backhouse*, E. B. & E. 622. The decisions in *Ohio, etc., R. W. Co. v. Simon*, 40 Ind. 278, and *Lucas v. Marine*, 40 Ind. 289, cited by counsel for the appellee, give no consideration to the question of the effect of a complete injury, or of a continuing source of injury, but were decided upon the theory that the injurious results had accrued fully more than six years before suit.

Applying these rules to the present case, it is apparent that, from the third paragraph of complaint a

Siberry v. The State.

cause of action did not accrue until the year 1890, or within the six year period next before this suit was instituted; that the second paragraph of complaint, alleging the complete destruction in 1883 of the appellant's property for the uses from which its value arises, brought together the wrong or injury and the damages long before the period of limitation, and there are no allegations of new or additional loss. The cause of action pleaded, therefore, in the second paragraph of complaint, was barred, and that pleaded in the third paragraph was not barred. We, of course, venture no opinion as to the periods during which damages may be recovered upon the third paragraph prior to six years and after the bringing of the suit.

The judgment of the lower court is reversed for the error in overruling appellant's demurrer to the appellee's answer to the third paragraph of complaint.

SIBERRY v. THE STATE.

[No. 17,161. Filed March 1, 1895. Rehearing denied April 21, 1895.]

CRIMINAL LAW.—*Indictment.*—*Misjoinder of Counts.*—*Appeal.*—The question as to whether there can be a joinder, in the same indictment, of two counts, one for murder and the other for involuntary manslaughter, cannot be presented on appeal, where the record does not show a motion to quash to have been made. *p. 687.*

APPEAL AND ERROR.—*On Second Appeal the Record of First Not Available to Disclose Error.*—On a second appeal of the same case, the record of the first appeal cannot be considered for the purpose of discovering erroneous rulings of the trial court. *pp. 687, 688.*

CRIMINAL LAW.—*Homicide.*—*Evidence.*—Where an indictment is in two counts, one charging murder in the first degree and the other charging involuntary manslaughter, evidence showing that the killing was intentional is admissible. *p. 688.*

APPEAL.—*Bills of Exception.*—*Motion for New Trial.*—Statements contained in a motion for a new trial as to alleged errors must be shown to be true by proper bills of exception, or they will not be considered on appeal. *p. 689.*

SAME.—*Appellant's Counsel Must Cite Page and Line of Record*

149	684
149	398
149	613
151	502

149	684
157	446
149	684
163	293

148	684
169	507

149	684
1171	101

Siberry v. The State.

Where Ruling is Found.—The Supreme Court will not search the record to find alleged rulings of the trial court where there has been a failure on the part of appellant's counsel to cite pages and lines of record as required by rule twenty-six of the Supreme Court. *p. 689.*

CRIMINAL LAW.—*Homicide.*—*Evidence.*—On a prosecution of a husband for the killing of his wife, under an indictment charging murder in the first degree in one count, and involuntary manslaughter in another, the admission of evidence showing that deceased was true to her husband is not reversible error where the conviction is for involuntary manslaughter. *pp. 689, 690.*

APPEAL.—*Error Should be Assigned in Motion for New Trial.*—Error in the finding of the trial court, to be available on appeal, should be assigned as error in the motion for a new trial. *p. 690.*

EVIDENCE.—*Shorthand Reporter as Witness.*—*Cross-examination.*—Where a shorthand reporter is called as a witness and testifies as to the testimony of a particular witness on another trial of the same case, the cross-examination of such shorthand reporter must be confined to the particular evidence given by him in his examination in chief, or such as is explanatory thereof. *pp. 690, 691.*

APPEAL AND ERROR.—*Criminal Law.*—*Preponderance of Evidence.*—The Supreme Court will not reverse a conviction by the trial court, even though the preponderance of the evidence was against the verdict, if that part of the evidence supporting the verdict is legally sufficient to establish all the essential facts to constitute the crime with which the defendant was found guilty. *p. 691.*

SAME.—*Exception.*—*Presumptions.*—To be available on appeal it must appear affirmatively that the ruling of the court excepted to was actually made, as the Supreme Court will adopt the presumption that upholds the judgment upon which the appeal is prosecuted. *pp. 691-693.*

INSTRUCTIONS.—*Refusal to Give.*—No error is committed in refusing to give requested instructions which were substantially given by the court of its own motion. *p. 694.*

JURY.—*Disqualification of Juror.*—*Reading Newspaper Accounts of Former Trial.*—To render a juror incompetent on account of having read newspaper accounts of a former trial of the cause it must be shown that the account read was a report of the evidence. *pp. 694, 695.*

CRIMINAL LAW.—*Drawing Deadly Weapon.*—*Statute Construed.*—To constitute a violation of section 2068, Burns' R. S. 1894 (1884, R. S. 1881), making it a crime to draw a dangerous or deadly weapon, it need not be shown that the person intended using the weapon on the person upon whom it was drawn, but is in the purview of said section if it is shown that the weapon was drawn in such manner

Siberry v. The State.

that it might be used to his injury, as to point the muzzle of a gun or revolver at another. pp. 696, 697.

CRIMINAL LAW.—*Involuntary Manslaughter.*—*Unlawful Act.*—To constitute the crime of involuntary manslaughter while committing the unlawful act of drawing or pointing a revolver at the person killed, in violation of section 2068, Burns' R. S. 1894 (1884, R. S. 1881), it need only be shown that defendant intentionally pointed the muzzle of the revolver at such person. pp. 697, 698.

INSTRUCTION.—*Reasonable Doubt.*—*Inaccurate Definition.*—*Harmless Error.*—*Criminal Law.*—In order to justify the reversal of a case on the ground that the court in its instruction gave an inaccurate definition of reasonable doubt, it must plainly appear that defendant was prejudiced in his substantial rights thereby. pp. 701, 702.

APPEAL AND ERROR.—*Rehearing.*—*Questions Presented for First Time.*—Questions cannot be presented for the first time in a petition for a rehearing. p. 702.

JURY.—*Challenge for Cause.*—*Peremptory Challenge.*—*Harmless Error.*—*Criminal Law.*—Where the court overrules defendant's challenge made to two jurors for cause, and such jurors were afterward excused on defendant's peremptory challenge and defendant went to trial without exhausting all of his peremptory challenges, such ruling did not prejudice the substantial rights of defendant and was harmless. p. 703.

INSTRUCTIONS.—*Weight of Evidence.*—*Criminal Law.*—An instruction to the jury in the trial of a person charged with manslaughter, to the effect that the jury might consider statements made by defendant that he committed the homicide as strong proof against defendant in determining the fact as to whether he did commit the homicide or not was not such an invasion of the right of the jury to determine the weight of the evidence as would amount to reversible error, where the defendant admitted the killing, and other instructions were given defining criminal homicide. p. 704.

NEW TRIAL.—*Cruel and Excessive Punishment Not Ground For.*—*Criminal Law.*—Cruel and excessive punishment is not a statutory ground for a new trial. p. 705.

CRIMINAL LAW.—*Cruel and Excessive Punishment.*—The Supreme Court cannot say that the punishment assessed by the jury in the trial of a criminal cause is excessive where the punishment is fixed within the limits of the statute. p. 706.

From the Wells Circuit Court. *Affirmed.*

Levi Mock, Abram Simmons and E. L. Watson, for appellant.

W. A. Ketcham, Attorney-General, and A. G. Smith, for State.

Siberry v. The State.

MCCABE, C. J.—The appellant was prosecuted by indictment, in the Wells Circuit Court, in which there were two counts, one charging him with murder in the first degree, and in the second with involuntary manslaughter, in the killing of his wife, Emma Siberry. On a plea of not guilty he was found guilty of involuntary manslaughter, as charged in the second count, and his punishment was fixed by the jury at imprisonment in the state prison for fifteen years. The court rendered judgment upon the verdict. Upon appeal to this court that judgment was reversed on account of error in the instructions of the court, and a new trial was ordered. *Siberry v. State*, 133 Ind. 677. Among the errors assigned on that appeal was the action of the court in overruling the motion of the appellant to quash the indictment. That error was not passed on in that appeal. On remanding the cause the new trial resulted in another verdict of guilty of involuntary manslaughter, fixing the punishment at twelve years imprisonment in the state prison, on which the trial court rendered judgment over appellant's motion for a new trial and in arrest of judgment.

Among the matters assigned here for error is the action of the trial court in overruling appellant's motion to quash the indictment. The objection urged to the indictment is that a count for murder cannot be joined with one charging, as here, involuntary manslaughter. But we find no motion to quash in the record, and no ruling thereon, hence the question of the propriety of uniting a count for murder with a count for involuntary manslaughter in the same indictment is not presented to this court by the assignment of error. There may have been such a motion overruled before the case came to this court on the former appeal, but the present record does not show it. The report of the former appeal cited above shows that to

Siberry v. The State.

have been the case. But the errors assigned on this appeal must be made apparent on the face of the record on this appeal. All the record after the return of the indictment to the return of the case from this court to the trial court seems to have been omitted from the transcript in this appeal. Appeals are heard upon the record and by the record determined. Errors must be manifest on the face of the record. It is the duty of a party who asks an appellate tribunal to reverse the judgment of a trial court to bring a perfect record to the appellate court, making the error he assigned apparent on the face thereof, so that the appellate court can find in the record the proof of the complaint made in the assignment of errors. The appellate tribunal can look nowhere else for such proof. Elliott's App. Proc., section 186, and authorities there cited. But the statute seems to authorize counts for murder in the first and second degrees and manslaughter to be joined in the same indictment or information. Section 1814, Burns' R. S. 1894 (1745, R. S. 1881); *Powers v. State*, 87 Ind. 144.

There was testimony of several witnesses introduced by the State on the trial, over the appellant's objection, tending to show ill feeling of the appellant toward the deceased during their marriage relation. It is contended this was error inasmuch as its tendency was to prove intention and motive to kill her on the part of the appellant, and the jury having found him guilty only of involuntary manslaughter in which there can be no intention to kill. The proposition furnishes its own refutation. Because no matter how strong it tended to prove an intentional killing, yet the verdict proves that it did not harm appellant, because the jury found that no such intention existed. Such testimony might possibly have been inadmissible had there been no other count than the second,

Siberry v. The State.

charging nothing but involuntary manslaughter, but the first count charged murder in the first degree, making evidence of an intentional killing admissible. It was the right of the State to try to prove that count if it could. This same class of testimony was held by this court to have been rightly admitted on the former appeal. *Siberry v. State*, 133 Ind. 677.

It is next complained that the court permitted the State to prove by the witness John Coons that he remained at the house of Mr. Campbell, where the killing occurred, under the direction of the sheriff, to guard the appellant the night after the homicide, of which direction and purpose the appellant was wholly ignorant. Counsel in their brief refer us to the page and lines of the record where it is claimed this ruling may be found. On turning to that place in the record we find such a ruling stated, but is simply so recited in the motion for a new trial. Such recitals must be shown to be true by the record outside of the motion for a new trial, or by bill of exceptions. *Indianapolis, etc., Mfg. Co. v. First Nat'l Bank*, 33 Ind. 302; *Skillen v. Skillen*, 41 Ind. 122; *Hopkins v. Greensburg, etc., Turnpike Co.*, 46 Ind. 187; *Vawter v. Gilliland*, 55 Ind. 278; *Hyatt v. Clements*, 65 Ind. 12; *Clouser v. Ruckman*, 104 Ind. 588; *Deal v. State*, 140 Ind. 354. If there is such a ruling in the record, rule twenty-six of this court requires the appellant's counsel to cite the pages and lines of the record where it may be found. We have often held where that was not done we would not search the record to find such error. The record here contains nearly 850 pages.

It is next urged that the court erred in admitting the evidence of William H. Wilson over the appellant's objection in answer to the question whether he had ever during the marriage relation of appellant and his

Siberry v. The State.

wife, kept her company. The answer was, "No, sir." The objection to the admission of the evidence stated was that it was irrelevant, incompetent, and immaterial. We are inclined to think that the evidence was subject to that objection, but that its admission was harmless. It certainly did not tend to prove anything against the appellant. To prove that his wife had been circumspect and prudent in her conduct, if it tended to establish anything concerning the homicide, it was that he had less motive, and therefore it tended to negative intention to kill. But the finding of the jury makes it absolutely certain that the evidence did not harm him, because the verdict finds that he did not intend to kill.

On cross-examination of George Patterson, a witness for the defendant, the court permitted the State to ask him the question: "I will ask you if you took the defendant there [to the state prison] at the time referred to in pursuance of a verdict and judgment rendered against the defendant in this court for murder?" And over a proper objection timely made by appellant, permitted him to answer, "Yes, sir." This is quite an ugly ruling of the trial court, but it was not assigned as one of the reasons for a new trial, and therefore its correctness is not presented to this court for review.

The State proved by the shorthand reporter that appellant on the former trial as a witness in his own behalf had made certain answers to certain questions as to how the homicide occurred. The appellant claiming the right to cross-examine the shorthand reporter, asked him if the defendant as such witness had not during such examination made certain other answers to certain other questions and on objection by the State such questions and answers on cross-examination were excluded. This ruling is urged as

Siberry v. The State.

error. The questions were not strictly cross-examination any more than it would have been under such claim to cross-examine to have gone on and called out all of appellant's testimony on that trial entirely. But the question did not seek to call out such portion of appellant's former testimony as was explanatory of that part that the State had put in evidence. And at most that was the utmost extent to which appellant could rightfully go in that direction. Therefore there was no error in sustaining the objection.

It is next contended that the evidence is not sufficient to sustain the verdict, but we think it was amply sufficient. It is true there was some conflict in it. If even the preponderance of the evidence was against the verdict if that part of the evidence tending to support the verdict is legally sufficient to establish all the essential facts to constitute the crime the defendant was found guilty of, we cannot reverse because that would be reversing for an error of fact and not of law. We can only reverse for errors of law. *Deal v. State, supra*, and authorities there cited. But we are inclined to think a fair preponderance of the evidence supports the verdict. At all events there was amply sufficient evidence to warrant the jury in finding that the appellant drew a revolver, a deadly and dangerous weapon, upon his wife in violation of the statute, though not intending to kill her. That while engaged in that unlawful act the revolver was accidentally discharged, shooting her, from which she immediately died.

The next error urged is the giving of instruction numbered 26. Counsel for appellant in their able brief have cited us to the page and lines of the record where it is found. While the instruction philologically and legally speaking in the strict sense is quite meaningless, and we think it ought never to have gone

Siberry v. The State

to the jury on account of its liability to mislead them; yet the appellant is not in a situation to avail himself of the error, if error there was in giving it. In his motion for a new trial he complains that the court erred in giving to the jury thirty-one different instructions on its own motion, specifying them by their numbers and relies on the giving of each of them as an error for which a new trial is asked. But there is no one of them that is numbered 26. The bill of exceptions shows that the court did give to the jury on its own motion the instruction complained of in the brief and it is numbered 26. But the giving of that instruction is not specified in the motion for a new trial as a ground or reason therefor. Another paragraph of the motion for a new trial specifies the giving of a large number of instructions given by the court at the request of the State, specifying them by number and instruction 26 is among them, but it is not the instruction complained of in the brief of counsel. Having failed to assign the giving of instruction 26 on the court's own motion as a cause or reason for a new trial, the error in giving it if any there was is not presented by the record before us.

The next point made in appellant's brief for a reversal is the giving instruction numbered 23. We find the instruction in the record at the place pointed out in the brief and it is among a series of instructions purporting to have been asked by the State. As to those instructions the bill of exceptions reads thus: "That on the trial of said cause the State asked the court to give the following instructions:" Then follows the series of instructions last mentioned. Immediately at the end of the instructions follows this language, to wit: "To the giving of all and each of which the court gave to the jury, to the giving of which instructions and each of them the defendant

Siberry v. The State.

excepted." This was nothing more than an exception to the giving of each of the instructions and to be available as an exception, it must appear affirmatively that the ruling excepted to was actually made by the court. Elliott's App. Proc., section 593, and authorities there cited. Whether this series of instructions was actually given by the court is not stated in the bill of exceptions. It is stated that the State requested the court to give them, but whether the court actually gave them is not stated. If we construe the first part of the sentence as a feeble attempt to express the idea of actually giving instructions we would still be left in doubt as to what ones of the series were given. "To the giving of all and each of which the court gave to the jury" would seem to indicate a purpose to except to each of the instructions that the court had given without indicating what particular ones in the series had actually been given. Here the most that can be said in favor of the statement is that it may be inferred or presumed that the court had given the instructions or it would not have allowed an exception to the giving of them or any of them. Judge Elliott, in his work last cited, says: "If the appellate tribunal is compelled to resort to presumptions it will choose that which will sustain the proceedings of the trial court and reject that which would overthrow them. If the condition of the record is such as to require the higher court to act upon a presumption it will, without hesitation, adopt the presumption that upholds the judgment upon which the appeal is prosecuted. It has been held, upon this general principle, that it is not enough to show that 'error may have been committed,' but it must be shown that error was actually committed." Elliott's App. Proc., section 709, and authorities there cited. The record, therefore, is not in a condition to present to us the question of the cor-

Siberry v. The State.

rectness of said instruction. Instruction 24 complained of belongs to the same series and is in the same fix.

It is next complained that the court erred in refusing instruction 31 asked by the defendant in a series asked by him. There was no error in this refusal, because the court had already substantially so instructed in the series given on its own motion. Instructions 34 and 37 belonging to the same series are in the same fix, having been substantially given in the series given by the court on its own motion. There was, therefore, no error in their refusal.

The next point made in appellant's brief is that the court erred in modifying instructions 10, 11, 14, and 41, asked by the defendant. We have examined these instructions as originally asked and as modified. To set them out here would needlessly extend this opinion, for they are very lengthy. It is sufficient to say that the modification scarcely made any material change in them. The court did not err in the modification.

A person called as a juror, Henry H. Reed, stated on his *voir dire* that he had formed an opinion as to the guilt or innocence of the accused and that notwithstanding that opinion he thought he could give the defendant a fair and impartial trial. That he had formed his opinion from reading newspaper accounts of the former trial. Being asked whether he had read that which purported to be the evidence given in the cause on such former trial he answered, "Yes, a part of it, at least." He then stated that he then had no opinion as to the guilt or innocence of the defendant. The court overruled the challenge. One Joseph Awkerman, called to serve on said jury, answered on his *voir dire* about the same as the other one, except that he was not positive that his opinion was formed

from reading the evidence of the former trial. The appellant challenged both jurors for cause which the court overruled. It does not appear that the opinion of either of them was formed from reading "the reports of the testimony of witnesses to the transaction." That one has formed or expressed an opinion as to the guilt or innocence of the defendant is ground for challenge by the statute; and it provides that "if it appear to have been founded upon reading newspaper statements, communications, comments, or reports or upon rumors or hearsay, and not upon conversations with witnesses to the transaction, or reading reports of their testimony, or hearing them testify; and [if] the juror state on oath that he feels able notwithstanding such opinion to render an impartial verdict upon the law and evidence, the court * * * may in its discretion admit him as competent to serve in such case." Opinions formed upon conversations with witnesses to the transaction constituting the crime and reading reports of their testimony disqualify, notwithstanding the juror may state that he feels able to render an impartial verdict. The newspaper reports of the evidence the reading of which that are to have the disqualifying effect is newspaper reports of the evidence of the transaction constituting the crime.

The evidence fails to show that the opinion of either of the challenged jurors had been formed on reading newspaper reports of the evidence of the transaction. There was therefore no error in overruling the challenge.

Having carefully gone through all the alleged errors pointed out in appellant's brief, we find no error for which the judgment ought to be reversed.

The judgment is affirmed.

Siberry v. The State.

ON PETITION FOR REHEARING.

A very earnest petition for a rehearing is presented in this case. And it is supported by a very able brief on behalf of the appellee. The Attorney-General has interposed a brief in opposition thereto of marked and signal ability in which he has ably defended each one of the rulings made in the original opinion urged as erroneous by the appellant's learned counsel.

The first count of the indictment charged murder in the first degree and hence if there was excitement in the county against the defendant he could have compelled the granting a change of venue to another county. Section 1840, Burns' R. S. 1894 (1771, R. S. 1881). And yet notwithstanding the fact that the defendant on the first trial was by a Wells county jury found guilty and given fifteen years in the penitentiary, his learned counsel so justly complimented by the Attorney-General for their ability in the defense of the accused never asked for a change from the county either upon the first or second trial.

But let us see if the evidence does not prove the commission of the crime charged, namely, involuntary manslaughter. It is claimed it does not. If the facts show an unintentional killing while in the commission of an unlawful act, it constitutes involuntary manslaughter. *Brown v. State*, 110 Ind. 486; section 1981, Burns' R. S. 1894 (1908, R. S. 1881).

The second count of the indictment did not charge the appellant with an intentional killing of his wife. Nor did it charge him as his counsel seem to think, with killing his wife while "threatening to use a pistol already drawn upon another person." But it charged him with an unintentional killing of her while engaged in the commission of an unlawful act, to wit: while drawing a deadly weapon upon her, to wit: a revolver, and that the same was by him unintention-

Siberry v. The State.

ally discharged while so engaged whereby she was shot and killed. Therefore all the talk to the effect that the appellant ought not to be convicted because he did not intend to kill is idle and has no pertinency to the case. It is clear that it is because he did not intend to kill her; that, helped to make the offense involuntary manslaughter. If he had intended to kill her, that fact would have made it murder and not involuntary manslaughter.

The jury in finding him guilty of involuntary manslaughter as charged in the second count have found that he did not intend to kill his wife.

There is no controversy that the evidence establishes that the appellant killed his wife, because that fact he states under oath on the witness stand himself. And there is no controversy that the evidence justified the jury in finding that he did not intend to kill her. That much is beyond dispute. The only lacking element to complete the crime is, was he at the time engaged in the commission of some unlawful act when the revolver was unintentionally discharged, shooting her? Another section of the criminal code provides that: "Whoever draws, or threatens to use any pistol, dirk, knife, slung shot, or any other deadly or dangerous weapon, already drawn upon another person, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one nor more than five hundred dollars, to which may be added imprisonment in the county jail not exceeding six months." Section 2068, Burns' R. S. 1894 (1984, R. S. 1881).

It has been held under this section that if one draw a revolver at another and it is unintentionally discharged and kills the person on whom it is drawn, that it constitutes involuntary manslaughter, because the drawing of the revolver at the person killed was

Siberry v. The State.

an unlawful act, being in violation of the statute last quoted. *Surber v. State*, 99 Ind. 71. Counsel is right in saying that this statute means something more than merely having the pistol in one's hand when it goes off, and that to draw a pistol has a meaning beyond having it in one's hands. The language of the statute is, "Whoever draws, etc., * * * any pistol, etc., upon any other person, etc., shall be deemed guilty, etc. * * *"

To draw a weapon upon another means within the purview of that statute so to draw it that it may be used to his injury, as to point the muzzle of a gun or revolver at another; but it is not necessary that he intend to discharge or fire it off or shoot the person in order to constitute the violation of the statute quoted.

The only element of illegality necessary to constitute a violation of the statute and to make the act an unlawful one within the meaning of that part of the section defining involuntary manslaughter is, that the defendant intentionally pointed the muzzle of the revolver at his wife. It was to prevent such foolhardy acts, thereby endangering human life and limb by making them crimes and punishing the same that the statute against drawing deadly weapons upon others was enacted.

The only remaining question to be determined to enable us to decide whether counsel is right in holding that the "evidence does not warrant the finding and judgment" is to ascertain from the evidence whether the accused did intentionally point the muzzle of the revolver at his wife. That the revolver was discharged while in his hands, by his act, and that its load thus discharged struck his wife, causing her death in five minutes thereafter is conceded on all hands.

The appellant and his wife and Jonathan Campbell

Siberry v. The State.

and his wife, Ella Campbell, were all in the room together. Appellant had a new revolver lying on the bureau in the corner of the room which he was trying to trade to Campbell for a dozen chickens. Campbell also had an old broken revolver lying on the same bureau. Campbell took up the new revolver and sat on the bed in another corner of the room to examine it.

Up to this point the testimony of the appellant and Campbell and his wife, the only living eye-witnesses, substantially agree. Then both Campbell and his wife testify that appellant in a playful way commenced snapping the old broken revolver at his wife, which he did three or four times, while Campbell was examining the new. That his wife remarked, "you can't make me flinch," and he said, "I can with the other one," and she replied, "no you can't, or you are afraid to," or something of that kind. That appellant immediately walked across the room to Campbell, took the new revolver out of Campbell's hands, started across the room toward his wife, pointing the revolver toward her, making it give out a clicking sound. That the Campbells heard it "click" three or four times, and that it went off and was discharged, the discharge entering his wife's body, causing her death as before stated. The appellant was a witness on his own behalf and in his testimony substantially agrees with all the testimony of Mr. and Mrs. Campbell, except as to pointing the revolver at his wife. That, he denies and says he was going to the bureau with it to put it away and was revolving the cylinder so as to rest the hammer on the one empty chamber and that as he was so doing he did not know that his wife was in range with the muzzle of the weapon when the hammer slipped from under his thumb and caused the explosion. He positively denies that he snapped the old revolver at his wife or that there was anything said

Siberry v. The State.

between him and her about snapping either revolver at her, though he admits he snapped the old revolver, but says it was pointed at the floor and not at his wife. It further appears from the evidence that the Campbells were friendly to the appellant. The homicide occurred about 9 o'clock in the morning. Appellant remained about the house all the remainder of the day, and during the day told a number of persons who called there how the killing occurred. Among them were the sheriff of the county, Mr. Daily, the prosecutor, Mr. Branyan, George Kirkwood, and others, and they all testified that he gave substantially and in effect the same account of how it happened as that given by Mrs. Ella and Mr. Jonathan Campbell. The house at which it occurred was the residence of the Campbells, and appellant and wife were temporarily boarding there. There was some evidence tending to prove an intentional killing, but that went to the support of the count for murder.

But the verdict is that there was no intentional killing. Now how the jury under this evidence could have found him less than guilty of involuntary manslaughter is something we are wholly unable to understand. They have solved every question where there was room for doubt in favor of the accused.

Thus we see that the counsel is seriously, though doubtless honestly and conscientiously mistaken, both as to the law and the facts in this case.

The courts are charged with the high duty of upholding the majesty of the law that human life, liberty and property may be made secure. That object is as effectually accomplished by adjudging that the innocent shall go acquit as that the guilty shall be punished. But when the courts shall adjudge that the guilty shall escape the penalty, the law has annexed to their crimes through an appeal to human

Siberry v. The State.

sympathy, the strong arm of the law that encircles us all by day and by night and shields us from the lawless is paralyzed and made useless.

We now turn to the other grounds urged for a rehearing by the appellant's learned counsel.

The point made that we are too technical in holding that instructions 23 and 24, asked by the State, are not shown by the bill of exceptions to have been actually given. We have reexamined that question and still think we were right.

But waiving that objection and treating those two instructions as having been given to the jury, we are of opinion that the giving of said instructions if even they were so given to the jury did not constitute prejudicial error against the appellant. Said instructions were both devoted wholly to an effort to define what a reasonable doubt is. As we have seen, the only question of fact about which there was any room for doubt of any kind was solved by the jury in favor of the defendant. There was not even a dispute in the evidence that by the defendant's act a loaded revolver was fired into his wife's body, causing her death in five minutes. While the defendant's testimony alone in a lame and halting and inconsistent manner disputes that he intentionally drew or pointed the revolver at his wife, yet the testimony of a large number of impartial witnesses overwhelmingly establish that he admitted that he did so draw the weapon upon and point the same at his wife, taken with the evidence of the two Campbells, leaves no room for any kind of a doubt, that he in truth did so.

Therefore if the instructions in question did not accurately define a reasonable doubt it could not have harmed the appellant. It may be conceded that those instructions did not quite accurately define a reasonable doubt. But this court has held that: "Indeed,

Siberry v. The State.

we might add, that in order to justify the reversal of a case for a merely inaccurate definition of what constitutes 'a reasonable doubt,' it must very plainly appear that the defendant was prejudiced in his substantial rights thereby." *Heyl v. State*, 109 Ind. 593; section 1964, Burns' R. S. 1894 (1891, R. S. 1881). To the same effect is *Skaggs v. State*, 108 Ind. 53; *Epps v. State*, 102 Ind. 539; *Strong v. State*, 105 Ind. 1; *Galvin v. State*, 93 Ind. 550.

The next point urged is the error assigned that the trial court overruled the motion in arrest of judgment. It might be sufficient answer to this contention to say that no such question was urged on the original hearing and that it is too late to raise it for the first time on petition for a rehearing. The same objection was urged under the assignment of overruling appellant's motion to quash. This court having ascertained that no such motion or ruling is contained in the record the appellant's learned counsel confessing the fact now for the first time, urge that the motion in arrest of judgment ought to have been sustained, not because the indictment does not state facts sufficient to constitute a public offense, nor because the grand jury had no legal authority to inquire into the offense charged by reason of its not being within the jurisdiction of the court, but because a count for murder is joined with a count for involuntary manslaughter. We held in the original opinion that the statute expressly authorized such joinder. Section 1818, Burns' R. S. 1894 (1749, R. S. 1881). Yet the appellant's learned counsel and the Attorney-General continue to object to the validity of such joinder without suggesting any reason why we should disregard the statute. But if we even had the power to nullify the statute and hold such joinder unauthorized we could not do so on a motion in arrest, as the statute only authorizes

Siberry v. The State.

such a motion to be made on the two grounds above mentioned, namely, want of jurisdiction and want of sufficient facts. Therefore, there could be no error in overruling the motion in arrest no matter what the law was as to the right of joinder of the two counts in one indictment.

The next point made is that we were in error in holding that the evidence failed to show that the jurors Reed and Awkerman formed their opinions from reading the evidence of the transaction. We have reexamined the evidence again and are confirmed in the opinion that we were right. But waiving that point, and conceding that they did so form their opinions, and that they were thereby disqualified, and that the trial court erred in overruling the appellant's challenge of them for cause, yet the record discloses that the ruling did not prejudice the substantial rights of the defendant, because he afterwards, as the record discloses, peremptorily challenged them and put them off of the jury, and when he accepted the jury, he had a good number of peremptory challenges which he had not exhausted. The criminal code requires this court to "not regard technical errors or exceptions * * to any decision or action in the court below which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant."

As long as he had accepted the jury voluntarily without having exhausted his peremptory challenges the error, if error it was, of forcing him to use two of his peremptory challenges to get rid of the two alleged incompetent jurors did not harm him, and hence must be disregarded by the express terms of the statute. Such is the rule recognized by this court in *Woods v. State*, 134 Ind. 35-38. *Brown v. State*, 70 Ind. 588, establishing a different rule upon this point, was hardly justified by the statute as it then stood, but is in direct

Siberry v. The State.

conflict with the statute above quoted, enacted since, and is overruled in so far as it is in conflict with that statute and this decision, and *Fletcher v. Crist*, 139 Ind. 121, in so far as it recognizes and follows *Brown v. State*, *supra*, is modified to conform to this opinion.

And lastly, appellant's counsel conceding the correctness of our holding that instruction 26, given by the court on its own motion, was not specified in the motion for a new trial, and therefore not presented for consideration, have lamented their client's ill luck through counsel's mistake in changing the number of the instruction in embodying it in the bill of exceptions, and say: "Indeed human life and liberty hang on a slender thread." Thus we have their intimation that if that mistake had not been made the appellant would have secured a reversal on account of error in giving that instruction. But we, in deference to counsel's earnestness, have carefully reexamined that instruction and find that it was utterly harmless as against the appellant. The part of the instruction to which exception is taken is if: "After her death the defendant voluntarily and without any inducement, made statements that he committed the homicide and how he committed it, and if you find, beyond a reasonable doubt, that he made any such statements, then such statements may be considered by you as strong proof against the defendant, in determining the fact as to whether he did commit the homicide or not, if you find there was a homicide committed."

The only words in the whole instruction objected to are: "then such statements may be considered by you as strong proof," etc. Those words are objectionable as invading the province of the jury to determine the weight of the evidence. But what is it that the charge authorizes them to consider such admissions strong proof of? Clearly, it was: "as to whether he did com-

Siberry v. The State.

mit the homicide or not." Anderson's Law Dictionary defines the word homicide as "A generic term, embracing every mode by which the life of one man is taken by the act of another." Homicide does not necessarily import crime. Appellant, in his own testimony, stated that by his act the life of his wife was taken. Therefore he himself testified before the jury that he committed the homicide. Therefore it could not harm him to tell the jury anything was strong evidence of a fact he admitted on the witness stand and did not dispute.

There were other instructions properly telling the jury what facts and circumstances would be required to make the appellant's acts criminal homicide, and what facts and circumstances would make it excusable homicide. Though the instruction in question was awkwardly framed in view of the evidence and the other instructions, it is very clear that it could not harm the appellant if it was even erroneous.

Another ground urged is that the punishment is cruel and excessive. There are nine grounds specified in the criminal code for each of which a new trial is authorized to be granted to the defendant. Section 1911, Burns' R. S. 1894 (1842, R. S. 1881). That the punishment is cruel and excessive is not embraced in any of them.

The penalty fixed by the statute for the crime the jury found the defendant guilty of is imprisonment in the state prison not more than twenty-one years, nor less than two years. Section 1981, Burns' R. S. 1894 (1908, R. S. 1881). Within those limits the jury are confined by the law in fixing his punishment if they find him guilty. Their discretion to fix the punishment anywhere within those limits cannot be controlled by the court. *Murphy v. State*, 97 Ind. 579;

The Manns Brothers, etc., Co. et al. v. Templeton et al.

McCulley v. State, 62 Ind. 428; *McLaughlin v. State*, 45 Ind. 338. It is held in *Ledgerwood v. State*, 134 Ind., at page 91, that if the punishment fixed is within the limits prescribed by the statute, as was the case here, this court cannot say that the punishment is cruel or excessive.

Thus we have, in deference to the pathetic appeal of appellant's learned counsel, patiently gone over every objection to the affirmance of the judgment below, and find our conviction greatly strengthened that there is not a shadow of legal ground for the reversal of that judgment.

Therefore, the petition for a rehearing is overruled.

THE MANNS BROTHERS BOOT AND SHOE COMPANY ET.
AL. v. TEMPLETON ET AL.

[No. 17,620. Filed Oct. 22, 1896. Motion to reinstate appeal overruled Nov. 18, 1896.]

APPEAL AND ERROR.—*Dismissal for Failure to File Brief Within Sixty Days.—Waiver.—Rules of Supreme Court.*—Where appellant's brief is not filed within sixty days after a cause is submitted it becomes the imperative duty of the Clerk of the Supreme Court, under rule twenty, to enter an order dismissing the appeal, unless before the expiration of the time limited the appellee shall have filed with the clerk a written request that the cause be passed upon by the court, and neither the clerk nor the parties by agreement can waive the requirement of such rule, except in the manner provided in its terms.

From the Decatur Circuit Court. *Appeal dismissed.*

Cortez Ewing and Davison Wilson, for appellants.

B. F. Bennett and Thomas E. Davidson, for appellees.

JORDAN, J.—Appellants unsuccessfully prosecuted this action against appellee in the lower court to set aside certain alleged fraudulent mortgages, assignments, and transfers, etc.

149	706
148	383
160	51
149	706
102	484

The Manns Brothers, etc., Co. *et al.* v. Templeton *et al.*

It appears from the record that this appeal was submitted and notice thereof issued on June 22, 1895. On the 16th of the following September appellant's brief was filed. This brief does not appear among the papers in the cause. On September 17, 1895, appellants and appellees filed with the clerk a written agreement, wherein it is recited that "it was heretofore agreed that said cause should not be dismissed for failure of appellants to file a brief within the time required by the rules of court." On January 20, 1896, a "substituted brief" was filed by appellants.

Rule twenty of this court provides: "Where a cause is submitted on call, by agreement, or upon notice, the appellant shall have sixty days in which to file a brief, and if a brief is not filed within the time limited, the clerk shall enter an order dismissing the appeal, unless the appellee shall have filed with the clerk a written request that the cause be passed upon by the court," etc. In the case at bar appellants did not file a brief until nearly a month after the expiration of the limit fixed by the above rule. This rule is mandatory, and if appellants' brief is not filed within sixty days after a cause is submitted it becomes the imperative duty of the clerk of this court to enter an order dismissing the appeal, unless before the expiration of the time limited, "the appellee shall have filed with the clerk a written request that the cause be passed upon by the court." Neither the clerk nor the parties by agreement can waive the requirement of the rule in question, except in the manner provided by its terms. *Stephens v. Stephens*, 51 Ind. 542; *Murray v. Williamson*, 79 Ind. 287; *Shulties v. Keiser*, 95 Ind. 159; *Elliott's App. Proc.*, section 449.

It is the duty of the clerk after the submission of a cause to examine the record and ascertain if the appellant has filed a brief within the time allotted, and if

Gott v. The State.

not, in the absence of the written request of appellee, he must enter an order dismissing the appeal. If, through inadvertence or otherwise, he fails to discharge this duty, and the fact of this neglect is apparent from the minutes upon the record, this court, on its own motion, not only may, but should, order the clerk to discharge this duty. We must now, therefore, order to be done what he omitted to do at the expiration of the period for the filing of appellants' brief.

The clerk is directed to enter an order dismissing this appeal at the cost of appellants.

GOTT v. THE STATE.

[No. 18,366. Filed March 9, 1898.]

From the Sullivan Circuit Court. *Affirmed.*

John S. Bays, for appellant.

W. A. Ketcham, Attorney-General, and Merrill Moores, for State.

MCCABE, J.—The appellant was indicted for an assault and battery with intent to commit a rape. On a trial of the charge, on April 6, 1897, the jury found him guilty as charged, and that his age was twenty years. The circuit court rendered judgment on the verdict, over appellant's motion for a *venire de novo* and for a new trial.

The judgment was as follows: "It is therefore considered, ordered and adjudged by the court that the defendant is guilty as charged in the indictment, and that he be confined in the custody of the board of managers of the Indiana Reformatory at Jeffersonville, Indiana, as guilty of the crime of assault and battery with intent to commit a rape upon a woman, for a term not exceeding fourteen years, nor less than two years, subject to the rules and regulations established by the board of managers of said reformatory. It is further considered, ordered and adjudged by the court that the defendant's true age is now twenty years." This verdict and judgment rest on the Reformatory Act, and for their validity depend upon the constitutionality of that act. The identical objections to its constitutionality are urged here as those urged in the case of *Miller v. State*, ante, 607. On the authority of that case we hold that such objections cannot prevail, and that the act is not unconstitutional.

That being the only question presented, the judgment is affirmed.

Keesling, Treasurer, *et al.* v. Winfield.

PULLEN ET AL. v. MCKEE ET AL.

149a 709
149 710

[No. 18,276. Filed Nov. 23, 1897. Rehearing denied Jan. 28, 1898.]

From the Marion Superior Court. *Affirmed.*

F. J. Van Vorhis, W. W. Spencer, William Irwin and Kealing & Hugg, for appellants.

Eli F. Ritter and Jason E. Baker, for appellees.

MONKS, J.—Appellees brought this action against appellants for damages and an injunction. The trial of said cause resulted in a final judgment in favor of appellees.

The only error assigned and not waived calls in question the action of the court in overruling appellants' motion for a new trial. The questions presented by the assignment of error depend upon the evidence. Counsel for appellees insist that the evidence is not in the record for the reason that it does not affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions. It does not appear from the record that the longhand manuscript was filed in the clerk's office before it was embodied in the bill of exceptions. The evidence is not, therefore, in the record. *Campbell v. State*, 148 Ind. 527; *Yellow Hammer, etc., Co. v. Carlin*, 148 Ind. 68, and cases cited; *Citizens Street R. R. Co. v. Sutton*, 148 Ind. 169, and cases cited; *Koons v. Beach*, 147 Ind. 137, and cases cited; *Hoover v. Weesner*, 147 Ind. 510.

No available error appearing in the record, the judgment is affirmed.

KEESLING, TREASURER, ET AL. v. WINFIELD.

[No. 18,205. Filed January 26, 1898.]

From the Cass Circuit Court. *Affirmed.*

149b 709
149 375

Nelson & Myers, for Appellants.

McConnell & Jenkins, for Appellee.

MCCABE, J.—The appellee sued the appellants, the treasurer, auditor and board of commissioners of Cass County to enjoin a sale of appellee's property for what was claimed as delinquent taxes, and the cancellation of the same on the duplicate.

The issues formed were tried by the court, resulting in a finding and judgment for the plaintiff over the defendant's motion for a new trial. The refusal of a new trial is the only question presented by the assignment of errors, and the only specification in that motion urged upon our consideration is that the evidence does not support

Pullen et al. v. Stewart et al.

the finding, and that the same is contrary to law. The only contention is that the evidence was not sufficient to warrant and require the trial court to find for the defendant. The evidence, however, which tends to support the finding of the court was amply sufficient, standing alone, to justify and require the finding as made by the court for the plaintiff. The controverted fact was whether the taxes in question had been paid. The husband of the plaintiff testified that he had paid them thirteen or fourteen years previous. There were other circumstances tending to show and authorizing the inference that they had been so paid. The evidence on the other side was the treasurer's books, from which there was no indication of the payment of such taxes. The evidence of payment, however, was amply sufficient to warrant the finding that they had been paid. And without intimating any opinion as to where the preponderance of the evidence was as to that issue, we cannot disturb the finding of the trial court because it is not our province to correct errors of fact purely, and that is what this would be if we should concede that the preponderance of the evidence was against the finding. *Deal v. State*, 140 Ind. 354.

We therefore cannot say that the circuit court erred in overruling the motion for a new trial. The judgment is affirmed.

PULLEN ET AL. v. EDWARDS ET AL.

[No. 18,277. Filed Nov. 23, 1897. Rehearing denied Jan. 28, 1898.]

From the Marion Superior Court. *Affirmed*.

J. Van Vorhis, W. W. Spencer, William Irwin and Kealing & Hugg, for appellants.

Eli F. Ritter and Jason E. Baker, for appellees.

MONKS, J.—The questions presented by the record in this case are the same as those in *Pullen v. McKee*, ante, 709. Upon the authority of that case this case is affirmed.

PULLEN ET AL. v. STEWART ET AL.

[No. 18,278. Filed Nov. 23, 1897. Rehearing denied Jan. 28, 1898.]

From the Marion Superior Court. *Affirmed*.

F. J. Van Vorhis, W. W. Spencer, William Irwin and Kealing & Hugg, for appellants.

Eli F. Ritter and Jason E. Baker, for appellees.

MONKS, J.—The questions presented in this case are the same as those in *Pullen v. McKee*, ante, 709. Upon the authority of that case this case is affirmed.

INDEX.

ABANDONMENT—Of office by removing to another state, see **OFFICERS**, 3, 4, 5, 6, 7, 8; *Relender v. State, ex rel.*, 233.

ABATEMENT OF ACTION—

Other Action Pending.—Where two complaints are identical, the relief demanded is the same, and the parties are the same, except in one case the plaintiff is styled receiver. and in the other trustee, the prior will abate the subsequent action.

Shepard, Rec., v. Meridian Nat'l Bank, 20.

AFFIDAVIT AND INFORMATION—Charging defendant with stealing turkeys is not bad for failure to state that the turkeys were domestic and in possession of the owner, where it is charged that they were in the possession of the person therein named, see **CRIMINAL LAW**, 2; *Skelton v. State*, 641.

AGREED CASE—See **SUBMISSION OF CONTROVERSY**.

AMENDED COMPLAINT—Facts existing at the time of filing the original complaint must be brought into the case by an amended complaint, see **PLEADING**, 3; *Chapman v. Jones*, 434.

APPEAL AND ERROR—Failure of trial court to furnish poor person with transcript of evidence in criminal cause, see **CRIMINAL LAW**, 19, 20; *Miller v. State*, 607.

The Supreme Court will not consider an alleged error in the admission of evidence in the trial of a criminal cause where the record does not contain the affidavit and information on which the prosecution is based, see **CRIMINAL LAW**, 18; *Riley v. State*, 48.

The question of misjoinder of counts in an indictment cannot be presented on appeal where no motion was made to quash the indictment, see **CRIMINAL LAW**, 1; *Siberry v. State*, 684.

How to present, on appeal, a decision of the trial court on an agreed case, see **SUBMISSION OF CONTROVERSY**, 1, 2; *City of Shelbyville v. Phillips*, 552.

1. *Notice.—Dismissal.*—An appeal will not be dismissed for failure properly to notify appellee of the pendency thereof, but the submission will be set aside for such cause. *Tate v. Hamlin*, 94.
2. *Notice.—Process.—Statute Construed.*—The notice provided by section 652, Burns' R. S. 1894 (640, R. S. 1881), to be issued by the Clerk of the Supreme Court in appeals after the close of the term at which the judgment is rendered must be served on the appellee. Notice served on appellee's attorney is insufficient. *Id.*

3. *Notice.*—An appeal is perfected by filing a transcript with a proper assignment of error thereon, within the time limited for taking an appeal, without the service of notice on the appellee. *Ib.*
4. *Assignment of Error.—Parties.*—The assignment of errors must contain the names of all the parties; the names of the appellants should be written before the abbreviation "vs." and the names of appellees after such abbreviation.
Barnett v. Bromley Mfg. Co., 606.
5. *Parties.—Same Rule Applies to Coparties as to Adverse Parties.*—The consequences which follow the omission of an appellant to comply with the law relative to bringing coparties before this court are the same upon his failure to observe the rule in regard to adverse parties.
Abshire v. Williamson, 248.
6. *Parties.—Dismissal of Action.*—The Supreme Court will dismiss a cause on its own motion where the parties necessary to a complete determination of the action are not brought into court.
Ib.
7. *Jurisdiction of Parties.*—The Supreme Court will not proceed to adjudicate an action until jurisdiction has been acquired over all the parties whose rights or interests will be necessarily affected by its judgment.
Ib.
8. *Joint Assignment of Error.*—An exception to two separate findings or conclusions of law is not available error if either conclusion is warranted by the facts.
Royce v. Bourne, 187.
9. *Assignments of Error.—Failure to Argue.—Waiver.*—Assignments of error are waived by failure to argue same.
Dunn v. Dunn, 424.
10. *Error Should be Assigned in Motion for New Trial.*—Error in the finding of the trial court, to be available on appeal, should be assigned as error in the motion for a new trial.
Siberry v. State, 684.
11. *Record.*—No question is presented on appeal on an assignment of error to the ruling of the court on a demurrer to the amended complaint, where neither the amended complaint nor the demurrer is set forth in the record.
Dunn v. Dunn, 424.
12. *Record.—Pleadings.*—The pleadings constitute the foundation of a cause of action and must be made a part of the record on appeal in order that the Supreme Court may be able to determine who the parties were to the suit, and to what extent their interests were affected by allegations or admissions therein.
Reid v. Reid, 274.
13. *Appeal Bond.—Motion to Dismiss for Failure to File.—Delay.—Waiver.*—Where a motion to dismiss an appeal on account of failure of appellant to file an appeal bond is delayed until a year has elapsed from the rendition of the judgment appealed from, and until after appellees have joined in error and filed briefs upon the merits of the appeal, such conduct will constitute a waiver of the right to move for the dismissal.
Jones, Exr., v. Henderson, 458.
14. *Dismissal for Failure to File Brief Within Sixty Days.—Waiver.—Rules of Supreme Court.*—Where appellant's brief is not filed within sixty days after a cause is submitted it becomes the imperative duty of the Clerk of the Supreme Court, under rule twenty, to enter an order dismissing the appeal, unless before the expiration of the time limited the appellee shall have filed with the clerk a written request that the cause be passed upon by the court, and neither the clerk nor the parties by agreement can waive the requirement of such rule, except in the manner provided in its terms.
Manns Brothers, etc., Co. v. Templeton, 706.

15. *Transcript*.—The trial court is the custodian of its own files, and when a transcript properly certifies a pleading to the Supreme Court, it must be accepted as conclusive, until the appellate tribunal is advised that the clerk will change his certificate, or that the lower court has, by some proper action, made the record or files below disclose a condition differing from that disclosed by the transcript.
City of Bloomington v. Phelps, 596.
16. *Record Imports Absolute Verity*.—The record on appeal imports absolute verity, and where a motion to strike out part of a pleading is not made part of the record by order of court or by bill of exceptions, and the clerk copies into the record the portion stricken out, the Supreme Court cannot disregard such part, but must, unless the proper correction is made by a writ of *certiorari*, consider the pleading as if no part thereof had been stricken out.
Dudley v. Pigg, 363.
17. *Appellant's Counsel Must Cite Page and Line of Record Where Ruling is Found*.—The Supreme Court will not search the record to find alleged rulings of the trial court where there has been a failure on the part of appellant's counsel to cite pages and lines of record as required by rule twenty-six of the Supreme Court.
Siberry v. State, 684.
18. *Bills of Exception—Motion for New Trial*.—Statements contained in a motion for a new trial as to alleged errors must be shown to be true by proper bills of exception, or they will not be considered on appeal.
Ib.
19. *Bill of Exceptions*.—A bill of exceptions must be signed by the judge before it is filed with the clerk.
Dudley v. Pigg, 363; *Starr, Treas., v. State, ex rel., Ketcham*, 592.
20. *Bill of Exceptions—Longhand Manuscript of Evidence*.—Prior to the taking effect of the act of March 8, 1897 (Acts, 1897, p. 244), it was necessary that the record should affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions.
Fitch v. Byall, 554; *Garrett v. State, ex rel.*, 264.
21. *Incorporation of Evidence in Record—Instructions—Statute Construed*.—Under the act of March 8, 1897, providing that the original bill of exceptions embracing the evidence may, on appeal, be certified as a part of the record, it is improper to incorporate the instructions, as the statute applies only to the evidence and its incidents.
Leach v. Mattix, 146.
22. *Bill of Exceptions—Evidence*.—The Supreme Court cannot consider and decide any question which depends for its decision upon the entire evidence, when the bill of exceptions affirmatively shows on its face that all the evidence is not in the record, notwithstanding a statement in the bill that it contains all the evidence.
Royse v. Bourne, 187.
23. *Record—Bill of Exceptions—Motion to Strike Out Part of Pleading*.—A motion to strike out part of a pleading, the ruling thereon, and the pleading or the part thereof stricken out, are not in the record, unless brought in by a bill of exceptions, or by an order of court.
Dudley v. Pigg, 363; *Shepard, Tr., v. Meridian Nat'l Bank*, 532; *State, ex rel., v. Halter*, 292.
24. *Record—Certification of Original Document*.—In the absence of statutory authority an original paper or document cannot be certified to the Supreme Court, so as to become a part of the record.
Leach v. Mattix, 146.

25. *Record.—Lost Pleading.*—A document furnished by counsel as a substitute for a lost pleading without any order of the trial court is no part of the record. *Davis v. Talbot, 80.*
26. *Special Bill of Exceptions.—Statute Construed.*—Under the provisions of section 642, Burns' R. S. 1894 (680, R. S. 1881), that either party may reserve any question of law decided by the court during the progress of the cause for the decision of the Supreme Court by a special bill of exceptions, questions of mixed law and facts cannot be thus presented, nor questions arising after the evidence was heard and the court's finding announced. *Haney v. Farnsworth, 453.*
27. *Instructions.*—Where it is not shown that the instructions set out in the record were all the instructions given, error cannot be predicated on a refusal to give certain instructions requested. *New York, etc., R. R. Co. v. Hamlet Hay Co., 344.*
28. *Interrogatories to Jury.—New Trial.*—Alleged errors in submitting to the jury certain interrogatories, and in refusing to require more specific answers to others, to be available on appeal must be assigned as reasons for a new trial. *Ib.*
29. *Special Finding.—Exception.*—Where an exception is made jointly to two or more conclusions of law, if either one is good the exception must fail. *Evansville, etc., R. R. Co. v. State, ex rel., 276.*
30. *Special Verdict.—Modification of Judgment.—Review.*—Where a special verdict is returned, and in answer to one interrogatory damages are assessed, and in answer to another the interest thereon is found, any error in the amount of interest is an error of law to be corrected by the court by a modification of the judgment, and could not be reviewed in passing on the action of the court in overruling the motion for a new trial. *New York, etc., R. R. Co. v. Hamlet Hay Co., 344.*
31. *Exception.—Presumptions.*—To be available on appeal it must appear affirmatively that the ruling of the court excepted to was actually made, as the Supreme Court will adopt the presumption that upholds the judgment upon which the appeal is prosecuted. *Siberry v. State, 684.*
32. *Excessive Judgment.*—An exception that the judgment is excessive, it being admitted that a judgment for some amount was proper, will not be considered on appeal, unless a motion to modify was made in the trial court. *New York, etc., R. R. Co. v. Hamlet Hay Co., 344.*
33. *Complaint.—Review.*—Where a cause is submitted to the jury upon a single paragraph of a complaint, other paragraphs thereof will not be considered on appeal. *Baltimore, etc., R. W. Co. v. Little, Admx., 167.*
34. *Reversal.—Technical Defects.*—Overruling a demurrer to a bad complaint affects the substantial rights of the defendant to such action and in such case the trial cannot have a just determination, except the determination be for the defendant, and the Supreme Court will not refuse to reverse such ruling on account of the provision of section 401, Burns' R. S. 1894 (393, R. S. 1881), to the effect that the Supreme Court shall not reverse any judgment for any error which does not affect the substantial rights of the adverse party. *Chapman v. Jones, 434.*
35. *On Second Appeal the Record of First Not Available to Disclose Error.*—On a second appeal of the same case, the record of the first appeal cannot be considered for the purpose of discovering erroneous rulings of the trial court. *Siberry v. State, 684.*

36. *Construction of Fee and Salary Law.—When Appeal Will Not Lie.*—No appeal will lie from an order of the trial court in a proceeding instituted by a county officer, under section 8105, Burns' R. S. 1894, for the construction of a fee and salary law.
In re Petition of Stroh, Sheriff, 164.
37. *Criminal Law.—Preponderance of Evidence.*—The Supreme Court will not reverse a conviction by the trial court, even though the preponderance of the evidence was against the verdict, if that part of the evidence supporting the verdict is legally sufficient to establish all the essential facts to constitute the crime of which the defendant was found guilty.
Siberry v. State, 684.
38. *Shorthand Reporter as Witness.—Cross-examination.*—Where a shorthand reporter is called as a witness and testifies as to the testimony of a particular witness on another trial of the same case, the cross-examination of such shorthand reporter must be confined to the particular evidence given by him in his examination in chief, or such as is explanatory thereof.
Id.
39. *Appointment of Receiver.—When Not Reviewed on Appeal.*—Where the record does not contain the affidavits upon which the question of the appointment of a receiver was submitted to the trial court, the question will not be reviewed on appeal.
Chicago, etc., R. W. Co. v. McBeth, 78.
40. *Failure to Except to the Appointment of Receiver.—Waiver.*—The failure of a party to except to the action of the trial court in the appointment of a receiver is a waiver of any question upon such appointment.
Id.
41. *Rehearing.—Petition.*—A petition for a rehearing must state specifically the errors which the petitioner considers the court committed in the former hearing; those not included therein will be deemed waived, and will not be considered.
Finley v. Cathcart, 470; Baltimore, etc., R. W. Co. v. Conoyer, 524.
42. *Rehearing.—Questions Presented for First Time.*—Questions cannot be presented for the first time in a petition for a rehearing.
Siberry v. State, 684; Chapman v. Jones, 434; State, ex rel., v. Halter, 292.

APPEARANCE—

- Special Appearance.—Jurisdiction.—Cross-Complaint.—Waiver.*—Where a defendant enters a special appearance and unsuccessfully denies the jurisdiction of the court over his person, and afterward enters a general appearance and files a cross-complaint demanding affirmative relief, he thereby waives the question of jurisdiction.
Chandler v. Citizens' Nat'l Bank, 601.

ASSIGNMENT OF ERRORS—As to joint assignment, see **APPEAL AND ERROR**, 8; *Royse v. Bourne, 187.*

ATTACHMENT—See **GARNISHMENT**.

ATTORNEY AND CLIENT—When notice to attorney not equivalent to notice to client, see **APPEAL AND ERROR**, 2; *Tate v. Hamlin, 94.*

1. *Action for on Quantum Meruit.*—Where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented by the client, the attorney may, as a rule, recover on the quantum meruit for the services rendered by him.
French v. Cunningham, 632.
2. *Contingent Fees.*—Where the compensation of an attorney is

contingent on the successful result of the suit. the measure of damages is not the contingent fee, but the reasonable value of the services rendered. *Ib.*

3. *Amount of Recovery in the Absence of Contract.*—In the absence of a contract fixing the amount of compensation, an attorney is entitled to recover what his services are reasonably worth, and it makes no difference, as to this right, whether the services were successful or not, unless the attorney's want of success was caused by his negligence or bad faith. *Ib.*
4. *Contract for Entered Into While the Relation of Attorney and Client Existed.*—In the enforcement of a written contract of employment entered into between attorney and client after the employment of such attorney by the client, the burden is upon the attorney to show the fairness of the transaction, and that the compensation provided for in the subsequent agreement does not exceed a fair and reasonable remuneration for the services to be performed; but such contract is not void by reason of it having been entered into subsequent to an employment. *Ib.*
5. *Partners.—Parties.*—Where plaintiffs were engaged in the practice of law as partners and defendant engaged one of them to render services for her as an attorney the other partner has such an interest in the compensation for such services as to make him a proper party plaintiff in an action to recover such compensation. *Ib.*

AUDITOR—See COUNTY AUDITOR.

BANKS AND BANKING—Where a bank pays out money on deposit after notice of a suit contesting the ownership thereof, it does so at its peril, see *LIS PENDENS*; *Pearce v. Dill*, 156.

Where a wife had funds on deposit in a bank and had given her husband no authority to draw checks on such deposit except in the transaction of her business, the bank is liable to the wife for money checked out by her husband in settlement of illegal option deals, the bank knowing the purpose for which the checks were given, see *TRUSTS*, 7; *Ib.*

BILL OF EXCEPTIONS—See *APPEAL AND ERROR*.

How motion to strike out parts of pleading made part of, see *APPEAL AND ERROR*, 28; *Dudley v. Pigg*, 363.

Prior to act of March 8, 1897, it was necessary that the longhand manuscript of the evidence should be filed with the clerk before being incorporated in the bill of exceptions, see *APPEAL AND ERROR*, 20; *Fitch v. Byall*, 554.

How instructions are made part of record on appeal, see *INSTRUCTIONS*, 13; *Hannan v. State*, 81.

Questions of mixed law and fact not presented by special bill of exceptions, see *APPEAL AND ERROR*, 26; *Haney v. Farnsworth*, 453.

Alleged errors set forth in motion for new trial must be shown to be true by proper bills of exception, see *APPEAL AND ERROR*, 18; *Siberry v. State*, 684.

BILLS AND NOTES—

1. *Married Woman.—Suretyship.—Note in Hands of Innocent Holder.*—The fact that a note is payable in bank and has passed into the hands of an innocent holder does not estop a married woman

from asserting that she executed the same as surety, and the consequent invalidity of the note as to her. *Leschen v. Guy*, 17.

2. *Married Woman.—When a Surety.*—Whether or not a married woman is a principal or surety is to be determined, not by the form of the contract, but by the inquiry as to whether she received the consideration for which the obligation was executed. *Ib.*

BOARD OF PARK COMMISSIONERS—The tenure of office provided in the act of 1897 creating such board is in violation of the provision of section 2, article 15 of the constitution, see CONSTITUTIONAL LAW, 5; *Indianapolis Brewing Co. v. Claypool*, 193.

BONDS—Where will is contested by cross-complaint a bond is not required, see WILLS, 11; *Putt v. Putt*, 30.

As to dismissal for failure to file appeal bond, see APPEAL AND ERROR, 18; *Jones, Exr., v. Henderson*, 458.

BRIDGES—Duty of railroad company in the construction of, see RAILROADS, 1, 2; *New York, etc., R. R. Co. v. Hamlet Hay Co.*, 344.

BRIEF—Failure to file in Supreme Court within sixty days after cause is submitted, see APPEAL AND ERROR, 14; *Manns Brothers, etc., Co. v. Templeton*, 706.

BUILDING AND LOAN ASSOCIATION—When mortgage executed to amounts to a contract of suretyship as to the wife, see HUSBAND AND WIFE, 4; *Harrison Building, etc., Co. v. Lackey*, 10.

Scope of Agent's Authority.—Where an agent of a building and loan association has authority to solicit applications for stock and to effect loans, it is within the scope of such agent's authority to bind the association by an agreement that the money advanced to a borrower should be used in the improvement of the mortgaged premises. *Wayne Inter. Bldg. and Loan Assn. v. Moats*, 123.

CANCELATION OF INSTRUMENT—Sufficiency of evidence in an action to cancel note on the ground of forgery, see EVIDENCE, 7; *Miller v. Dill*, 326.

CENSUS—Courts will take judicial notice of a census or other enumeration made under authority of the State or United States, see JUDICIAL NOTICE; *City of Huntington v. Cast*, 255.

CHATTEL MORTGAGE—The only way a lien on personal property may be given by creditor so as to be binding against any person except the parties, see LIENS, 1; *Franklin Nat'l Bank v. Whitehead*, 560.

CITIES—See MUNICIPAL CORPORATIONS.

CITY COMMISSIONERS—Section 3629, Burns' R. S. 1894, conferring the power to appoint upon circuit judges not unconstitutional, see MUNICIPAL CORPORATIONS, 6; *City of Terre Haute v. Evansville, etc., R. R. Co.*, 174.

COLLATERAL ATTACK—Of judgment taken before a justice of the peace, see JUDGMENT, 4; *Fitch v. Byall*, 554.

A person who abides the judgment of the court without appeal cannot attack such judgment in a collateral proceeding, see FORMER ADJUDICATION; *Thomas v. Thompson*, 391.

An assessment for street improvement cannot be collaterally attacked because the city failed to make proof of publication as to letting of contract a matter of record, see **MUNICIPAL CORPORATIONS**, 8; *City of Bloomington v. Phelps*, 596.

COMPLAINT—See **PLEADING**.

Sufficiency of, in an action to recover penalty for failure to list property for taxation, see **TAXATION**, 1, 2; *State, ex rel., v. Haller*, 292.

In actions for damages for personal injuries resulting from incompetent fellow servants, see **NEGLIGENCE**, 1; *Peterson v. New Pittsburg Coal, etc., Co.*, 260.

In an action against employer for failure to furnish safe place to work, see **MASTER AND SERVANT**, 1; *Ib.*

In action for malicious prosecution, see **MALICIOUS PROSECUTION**, 1; *Helwig v. Beckner*, 131.

In an action to set aside conveyance of real estate must describe the real estate with certainty, see **PLEADING**, 2; *Sheffer v. Hines*, 413.

In action to quiet title, see **QUIETING TITLE**, 1; *Chapman v. Jones*, 434.

By widow to set aside her election to take under the will of her deceased husband, see **WILLS**, 8; *Dudley v. Pigg*, 363.

To require railroad to construct street crossings, see **HIGHWAYS**, 8, 9; *Evansville, etc., R. R. Co. v. State, ex rel.*, 276.

In an action to review a judgment, see **JUDGMENT**, 5; *Jamison v. Lake Erie, etc., R. R. Co.*, 521.

In an action to set aside a judgment for want of proper service, see **PLEADING**, 1; *Fitch v. Byall*, 554.

1. *Action to Enforce Lien on Real Estate by Infant Legatees.—Demand.*—Where by the terms of a deed the grantee thereof was to pay to each of grantor's infant grandchildren a certain sum of money upon their arrival at the age of twenty-one years, respectively, a complaint by such grandchildren in an action against grantee, after their arrival at full age, to enforce a lien against the real estate so conveyed, need not allege a demand.

Richards v. Reeves, 427.

2. *Wills.—Support and Maintenance.—Demand.*—A complaint seeking a judgment for the support and maintenance and funeral expenses of a person against real estate devised, charged with the support of such person, need not allege a demand of defendants for such claim, nor a demand by decedent during his lifetime for the expenses of his support.

Clark v. Marlow, 41.

CONDEMNATION OF PROPERTY—The property of a corporation devoted to public use is subject to condemnation for a second use at the will of the legislature, see **CORPORATIONS**, 9; *City of Terre Haute v. Evansville, etc., R. R. Co.*, 174.

CONFLICT OF LAWS—Refusal of a foreign court to require a receiver within its jurisdiction to comply with an order issued by an Indiana court, see **MUTUAL BENEFIT ASSOCIATIONS**; *Cowan v. Failey, Rec.*, 382.

CONSTITUTIONAL LAW—As to residence of county officer, see OFFICERS, 6; *Relender v. State, ex rel.*, 283.

Section 3620, Burns' R. S. 1894, authorizing circuit judges to appoint city commissioners is not unconstitutional, see MUNICIPAL CORPORATIONS, 6; *City of Terre Haute v. Evansville, etc., R. R. Co.*, 174. Garnishment act of 1897, see EXEMPTIONS, 1, 2, 3, 4; *Pomeroy v. Beach*, 511.

The indeterminate sentence law is not invalid as an attempt to de-vest the judicial department of its powers and confer same upon the reformatory managers, see CRIMINAL LAW, 15; *Miller v. State*, 607.

The provisions of the constitution granting the accused in all criminal prosecutions the right to trial by jury is not violated by the Reformatory Act of 1897, see CRIMINAL LAW, 12; *Skelton v. State*, 641; *Miller v. State*, 607.

The indeterminate sentence law placing the defendant in the custody of the board of managers of the Indiana Reformatory to be confined by such board not less than the minimum time, and not more than the maximum time prescribed by statute is not in conflict with the provisions of section 16, article 1, of the constitution, that cruel and unusual punishment shall not be inflicted, and that all penalties shall be proportioned to the nature of the offense, see CRIMINAL LAW, 16; *Miller v. State*, 607.

The provision of section 16, article 1, of the constitution, that cruel and unusual punishment shall not be inflicted, has reference to the statute fixing the punishment and not to the punishment assessed by the jury within the limits of the statute, see CRIMINAL LAW, 17; *Shields v. State*, 395; *Siberry v. State*, 684.

1. *Construction of Constitution*.—Words or terms used in a constitution which is dependent upon a ratification by the people, must be interpreted in a sense most obvious to the common understanding at the time of its adoption. *Bishop v. State, ex rel.*, 223.
2. *Lucrative Office*.—*Constitution Construed*.—The term "deputy postmaster," as used in section 9, article 2 of the constitution, which provides against the same person holding more than one lucrative office at the same time, was, by the framers of the constitution, understood and intended to mean the office of postmaster as now denominated. *Ib.*
3. *Acceptance of Second Incompatible or Lucrative Office Forfeits First*.—Where the incumbent of a public office accepts and is inducted into a second office that is incompatible with the first, or where both are lucrative offices within the meaning of section 9, article 2 of the constitution, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first office. *Ib.*
4. *Practical Construction*.—Where a construction placed upon the constitution by the legislature has been acquiesced in by all of the departments of the State for over forty years, and a disregard thereof would destroy titles and impair the obligations of contracts, under the doctrine of practical construction such question will be regarded as settled.

City of Terre Haute v. Evansville, etc., R. R. Co., 174.

5. *Board of Park Commissioners.—Tenure of Office.*—The provision of the act approved March 1, 1895, sections 4246-4268, Thornton's R. S. 1897 (Acts 1895, p. 63), creating a department of public parks in cities having a population of more than 100,000, that the board of park commissioners shall hold office for the term of five years, is in violation of the inhibition of section 2, article 15, of the state constitution, that "the General Assembly shall not create any office the tenure of which shall be longer than four years," and the remainder of the act is inoperative for the reason that there are no instrumentalities left with which to carry the provisions thereof into operation and effect.

MONKS and JORDAN, JJ., dissenting.

Indianapolis Brewing Co. v. Claypool, 193.

CONTEMPT—

Violation of Injunction.—Defense.—Where a gas company violates an order of a court of equity, enjoining it from charging consumers more than a specified sum for gas, it is no defense to a prosecution for contempt, that the officers of the company acted in good faith, and without any intention of violating an order of the court.

Thistlethwaite v. State, 319.

CONTRACTS—Between attorney and client as to fees, see ATTORNEY AND CLIENT, 4; *French v. Cunningham*, 632.

Of husband and wife as to wife's real estate, see HUSBAND AND WIFE, 1, 2, 8; *Leach v. Rains*, 152.

Entered into by corporations contrary to public policy, or forbidden by statute, see CORPORATIONS, 8; *Franklin Nat'l Bank v. Whitehead*, 560.

Measure of damages in an action for breach of contract for work and labor, see WORK AND LABOR; *French v. Cunningham*, 632.

CONTRIBUTORY NEGLIGENCE—Of person injured while passing over defective sidewalk, see SPECIAL VERDICT, 4; *Town of Boswell v. Wakley*, 64.

In an action charging willful injury it is not necessary to allege and prove freedom from contributory negligence, see WILLFUL INJURY, 8; *Cleveland, etc., R. W. Co. v. Miller, Admr.*, 490.

CORPORATIONS—Action by receiver against stockholders to collect unpaid assessments on capital stock, see RECEIVERS, 4, 5; *Gainey v. Gilson, Rec.*, 58.

1. *Powers Of.*—A corporation possesses only such powers as are expressly given by law, and such implied powers as are necessary to enable it to exercise the powers expressly given.

Franklin Nat'l Bank v. Whitehead, 560.

2. *Manufacturing Corporation.—Warehouseman.*—A corporation organized under the laws for the incorporation of manufacturing and mining companies, for the manufacture and sale of nails and other products of steel and iron, is not authorized to engage in the business of a public or private warehouseman, or to issue warehouse receipts. *Ib.*

3. *Public Warehouseman.—Statute Construed.*—A manufacturing corporation not empowered to do the business of a public warehouseman, cannot be authorized to do so by the county auditor upon petition, under section 8704, Burns' R. S. 1894, providing that any person or incorporated company desiring to keep a public warehouse shall be entitled to do so upon receiving a permit therefor from the

- county auditor of the county in which such warehouse shall be kept. *Ib.*
4. *Pledging Manufactured Goods to Secure Debts.—Warehouseman.—Statute Construed.*—A manufacturing corporation that has never operated as a warehouseman does not become a private warehouseman within the meaning of section 8720, Burns' R. S. 1894 (6541, R. S. 1881), by issuing to creditors, to secure claims, what purport to be warehouse receipts covering goods kept in the building where they were manufactured. *Ib.*
5. *Warehousemen.—Issue of Receipts as Security for Debt.*—A public warehouseman has no power to issue warehouse receipts upon his own property in his own possession, and deliver the same as a pledge to secure an indebtedness. If a private warehouseman has such power it is by virtue of section 8724, Burns' R. S. 1894. *Ib.*
6. *Pledge of Property by Debtor, When Not a Warehouse Receipt.*—Where a debtor who is not a warehouseman issues a receipt purporting to be a warehouse receipt, on property in his possession and owned by him, for the sole purpose of securing a creditor, the same is not in any sense a warehouse receipt. *Ib.*
7. *Creditors Bound to Know Powers Of.*—Creditors of a corporation organized under the laws for the incorporation of manufacturing and mining companies are bound to know that such corporation has no power to carry on either a public or private warehouse or issue warehouse receipts. *Ib.*
8. *Contracts Ultra Vires.—Void Contracts.—Estoppel.*—The doctrine that when a corporation enters into a contract merely beyond its powers, which, if made by a private person, would have been binding upon him, and such contract has been performed by the other party thereto, the corporation will not be permitted to deny its power to make such contract, does not apply to contracts that are forbidden by statute, or are contrary to public policy. *Ib.*
9. *Special Charter.—Condemnation of Property.*—While the legislature may not amend or otherwise materially modify the special charter of a corporation unless the power is expressly reserved, yet the property of the corporation devoted to public use is subject to condemnation for a second use at the will of the legislature. *City of Terre Haute v. Evansville, etc., R. R. Co., 174.*
10. *Liability of Stockholders.*—When a stockholder of a corporation has paid the full par value of his stock, his liability is terminated, and in the absence of a statute imposing upon him an additional liability, he cannot be compelled to respond to the corporation nor to its creditors in payment of any debts except in cases where there has been a failure to duly incorporate. *Gainey v. Gilson, Rec., 58.*
- COSTS**—A sheriff has no right to demand payment of his fees before serving a summons issued to him from another county, see *OFFICERS, 1; McFarlan v. State, 149.*
- Consolidation of Causes of Action.—Apportionment of Costs.*—Where two causes were pending in which the evidence would be substantially the same, and by order of court the trial and proceedings were had in one cause, the finding therein to control the other cause, it will be presumed that the order of court was followed, and that no costs were made in the cause which was not tried, and the

judgment of the trial court overruling a motion to apportion the costs between the two causes will be sustained. *Miller v. Dill*, 326.

COUNTY AUDITOR—Power of to give casting vote in election of county superintendent, see **OFFICERS**, 2; *State, ex rel. Morris*, v. *McFarland*, 266.

To Whom He Must Issue Warrant for Township Funds.—It is the duty of a county auditor to issue a warrant for township money to one who is *prima facie* entitled to the office of township trustee.

Manor, Aud., v. *State, ex rel.*, 310.

COUNTY SUPERINTENDENT—Power of county auditor to give the casting vote in election of, see **OFFICERS**, 2; *State, ex rel. Morris*, v. *McFarland*, 266.

COURTS—See **JUDICIAL NOTICE**; **CONTEMPT**. The introduction of evidence out of its regular order is within the sound discretion of the court, see **TRIAL**, 2; *Miller v. Dill*, 326.

The extent to which the cross-examination of a witness may be carried is within the discretion of the trial court, see **WITNESSES**; *Shields v. State*, 395.

CRIMINAL LAW—Necessary allegations in affidavit and information charging person with obtaining money by false pretenses, see **FALSE PRETENSES**; *Funk v. State*, 338.

Cruel and excessive punishment is not a statutory ground for new trial, see **NEW TRIAL**, 1; *Siberry v. State*, 684.

When Supreme Court will not reverse a conviction on the evidence, see **APPEAL AND ERROR**, 37; *Siberry v. State*, 684; **EVIDENCE**, 8; *Shields v. State*, 395.

1. *Indictment.—Misjoinder of Counts.—Appeal.*—The question as to whether there can be a joinder, in the same indictment, of two counts, one for murder and the other for involuntary manslaughter, cannot be presented on appeal, where the record does not show a motion to quash to have been made. *Siberry v. State*, 684.
2. *Affidavit and Information.*—An affidavit and information charging defendant with stealing turkeys is not bad for failure to state that the turkeys were domestic and in possession of the owner where it is charged that they were owned by the person therein named and were of a given value. *Skelton v. State*, 641.
3. *Charge Must be Preferred with Certainty.*—In a criminal prosecution the particular crime with which the accused is charged must be preferred with such reasonable certainty by the essential averments in the pleading as will enable the court and jury to understand distinctly what is to be tried and determined, and fully inform the defendant of the particular charge he is required to meet. *Funk v. State*, 338.
4. *Involuntary Manslaughter.—Unlawful Act.*—To constitute the crime of involuntary manslaughter while committing the unlawful act of drawing or pointing a revolver at the person killed, in violation of section 2068, Burns' R. S. 1894 (1984, R. S. 1881), it need only be shown that defendant intentionally pointed the muzzle of the revolver at such person. *Siberry v. State*, 684.
5. *Drawing Deadly Weapon.—Statute Construed.*—To constitute a violation of section 2068, Burns' R. S. 1894 (1984, R. S. 1881), making it a crime to draw a dangerous or deadly weapon, it need

- not be shown that the person intended using the weapon on the person upon whom it was drawn, but is in the purview of said section if it is shown that the weapon was drawn in such manner that it might be used to his injury, as to point the muzzle of a gun or revolver at another. *Ib.*
6. *Homicide.—Evidence.*—Where an indictment is in two counts, one charging murder in the first degree and the other charging involuntary manslaughter, evidence showing that the killing was intentional is admissible. *Ib.*
7. *Homicide.—Evidence.*—On a prosecution of a husband for the killing of his wife, under an indictment charging murder in the first degree in one count, and involuntary manslaughter in another, the admission of evidence showing that deceased was true to her husband is not reversible error where the conviction is for involuntary manslaughter. *Ib.*
8. *Special Judge.—Objection.—Waiver.*—Where in the trial of a criminal cause on motion of the State for a change of venue from the regular judge, a special judge is appointed to try the cause without objection by defendant, he thereby waives his right to question the jurisdiction of the judge appointed by the regular judge. *Skelton v. State, 641.*
9. *Evidence.—Hearsay.*—A person injured, whether living or dead, is not a party to a criminal prosecution therefor, and his admissions and statements are not evidence, either for or against the accused, unless of the *res gestae*, dying declarations, or threats; but are hearsay, the same as those of any other third person. *Shields v. State, 396.*
10. *When Erroneous Instruction is Harmless.*—Where a defendant was indicted both for larceny and burglary in separate counts of the same indictment, an erroneous instruction to the jury as to the charge of larceny is not available for the reversal of a judgment finding the defendant guilty of burglary only. *Hart v. State, 686.*
11. *Verdict.—Indeterminate Sentence Law—Petit Larceny.—Indiana Reformatory Act.*—A verdict simply stating the age of defendant and that he is guilty of petit larceny as charged in the indictment, without fixing the punishment to be inflicted, is authorized by the Reformatory Act (Acts 1897, p. 69), where defendant is over sixteen and less than thirty years of age. *Skelton v. State, 641; Miller v. State, 607.*
12. *Indeterminate Sentence Law.—Invasion of Right to Trial by Jury.—Constitutional Law.—Indiana Reformatory Act.*—The provision of section 13, article 1, of the constitution granting the accused in all criminal prosecutions the right to a trial by jury is not violated by the Reformatory Act (Acts 1897, p. 69) in not requiring the jury to fix the punishment of defendant. *Ib.*
13. *Indeterminate Sentence Law.—Failure of Court to Fix Minimum Punishment.—Indiana Reformatory Act.*—In the trial of a criminal cause, under the indeterminate sentence law of 1897 (Acts 1897, p. 69), the failure of the court to fix the minimum punishment in the sentence is not error of which defendant can complain. *Skelton v. State, 641.*
14. *Indeterminate Sentence Law.—Disfranchisement.—Indiana Reformatory Act.*—The failure of the court to assess disfranchisement as part of the punishment, under the Reformatory Act, is not an error of which the defendant can complain. *Miller v. State, 607.*
15. *Reformatory Act.—Constitutional Law.*—The Reformatory Act of 1897 (Acts 1897, p. 69) is not in conflict with section 1, article 7, of the constitution, providing that "the judicial power of the

- State shall be vested in the Supreme Court, in circuit courts and in such other courts as the General Assembly may establish," nor with section 1, article 8, providing that "the powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided," as an attempt to divest the judicial department of its powers and confer same upon the board of reformatory managers, as the powers conferred upon the board of managers by said act are administrative and not judicial. *Ib.*
16. *Indeterminate Sentence Law.—Cruel Punishment.—Constitutional Law.—Indiana Reformatory Act.*—Section 8 of the Reformatory Act (Acts 1897, p. 69), providing that in the trial of felonies, if the defendant is found to be over sixteen years of age and less than thirty, and he be not guilty of treason or murder in the first or second degree, it shall only be stated in the finding of the court or verdict of the jury that the defendant is guilty of the crime charged, naming it, and that his age found is his true age, and that the court trying such person shall sentence him to the custody of the board of managers of the Indiana Reformatory to be confined at such place as may be designated by such board for a term not less than the minimum time prescribed by the statutes of this State and not more than the maximum time prescribed by such statutes therefor, to be determined by such board of managers according to its rules and regulations, is not in conflict with section 16, article 1, of the constitution, that cruel and unusual punishment shall not be inflicted, and that all penalties shall be proportioned to the nature of the offense. *Ib.*
17. *Excessive Punishment.—Constitutional Law.*—The provisions of section 16, article 1 of the constitution that cruel and unusual punishments shall not be inflicted, has reference to the statute fixing the punishment, and not to the punishment assessed by the jury within the limits fixed by the statute.
Shields v. State, 395; Siberry v. State, 684.
18. *Appeal.—Imperfect Record.*—Where the record does not contain the affidavit and information upon which the prosecution of appellant was based, the Supreme Court will not consider an alleged error of the trial court in the admission of evidence tending to prove other and different crimes than the one charged. *Riley v. State, 48.*
19. *Appeal by Poor Person.—Manuscript of Evidence.—Failure of Court to Furnish.—Remedy.*—The proper remedy for failure or refusal of the circuit court to furnish a poor person in a criminal cause with a transcript of the evidence at the cost of the county is by an application to the Supreme Court for an order requiring the court to furnish such transcript. *Müller v. State, 607.*
20. *Appeal by Poor Person.—Manuscript of Evidence.—Failure of Court to Furnish.*—The refusal of the court to furnish a poor person with a transcript of the evidence in the trial of a criminal cause, as provided by section 1474, Burns' R. S. 1894, after the trial and judgment, is not properly assigned as error of law occurring at the trial. *Ib.*
21. *Reenactment of Statute Not a Repeal of Statute.*—An amendatory statute, defining an offense and fixing the penalty for violation thereof in substantially the same language as that employed in the statute it amends, is not a repeal but a reenactment of the statute, and does not deprive the State of the right to prosecute for an offense committed before the act became effective.
State v. Kates, 46.

CROSS-COMPLAINT—Must state facts sufficient to entitle the pleader to some affirmative relief and cannot be aided by the allegations of other pleadings in the action, see **PLEADING**, 5; *Leach v. Rains*, 152.

DAMAGES—See **RAILROADS**.

Measure of, in an action for breach of contract for work and labor, see **WORK AND LABOR**; *French v. Cunningham*, 632.

DEDICATION—

Street and Railroad Crossings.—Easements.—Municipal Corporations.—Where by platted additions to a town, streets are dedicated to the public which cross a railroad track, and the railroad company constructed crossings over its track, and such streets and crossings were used by the public for general use as a public highway for six or seven years, the public acquired such rights therein as could not be divested by the railroad company tearing up the approach and crossings. *Evansville, etc., R. R. Co. v. State, ex rel.*, 276.

DEEDS—See **TRUST DEEDS**; **FRAUDULENT CONVEYANCES**. Deeds made by husband and wife in pursuance of postnuptial agreement in settlement of the interest of each in the real estate of the other, see **HUSBAND AND WIFE**, 2, 8; *Leach v. Rains*, 152.

1. *Acceptance Binds Grantee.*—Where a grantee accepts a deed and takes possession of the real estate thereby conveyed, he is bound by the conditions of the deed in like manner as if he had signed an agreement containing the same. *Id.*

2. *Gifts.—When May be Revoked.*—Where a person old and infirm made a conveyance of her real estate to her son, conditioned that he should pay a certain sum of money to her grandchildren upon their arrival at the age of twenty-one years, reserving a life estate therein for herself and husband, and intending to reserve the right to revoke the deed in case it should turn out that the income from the property should not be sufficient for her support and that of her husband, besides paying the necessary expenses of caring for the property, but through her own ignorance and mistake and that of the scrivener, such reservation was not put in the deed, a reconveyance thereof by the son at the request of the grantor, in consideration that if the son would pay the taxes and other expenses against the land she would reconvey same to him free from the conditions in favor of the grandchildren, defeated and revoked the gifts made to the grandchildren by the first deed.

Richards v. Reeves, 427.

DEMURRER—Form of to challenge paragraphs of pleading severally, see **PLEADING**, 6; *Baltimore, etc., R. W. Co. v. Little, Admr.*, 167.

When demurrer to an answer will not be carried back and sustained to complaint, see **PLEADING**, 7; *State, ex rel., v. Halter*, 292.

DESCENT AND DISTRIBUTION—See **HUSBAND AND WIFE**; **WILLS**.

Debt due estate by an heir is not barred by statute of limitations, see **LIMITATION OF ACTIONS**, 3; *Holmes v. McPheeters, Admr.*, 587.

Widow Remarrying.—Rights of Under Statute of 1852.—Partition.—Quieting Title.—A married woman, holding real estate by virtue of a previous marriage, could not, during such marriage, under

the statute of descents in force from 1852 to 1879, 1 Davis R. S. 1876, p. 411, alienate the same; and a judgment quieting title to real estate held by a married woman by quitclaim deed from the other heirs, in division of her deceased husband's real estate, made prior to the amendment of such statute, and adjudging her to have an absolute fee simple title, without any restraint upon her right to alienate the same, was erroneous, notwithstanding such deeds of partition were made in pursuance of an oral agreement, for the purpose of vesting in each a fee simple title absolute.

Mickels v. Ellsesser, 415.

DIVORCE—

1. *Allowance Made to Wife During Pendency of Action.—Discretion of Court.*—The trial court has power in divorce cases to make such allowances and orders as may be deemed necessary to enable the wife to prepare for and secure a fair and impartial trial, and also for her support during the pendency of the action, and such orders are within the discretion of the court and will not be reversed unless a clear abuse of such discretion is shown.

McCue v. McCue, 466.

2. *Allowance Made to Wife.—Evidence.—Sufficiency.*—Evidence given in a divorce suit in support of an interlocutory order for an allowance of \$100.00 for the use and support of the wife during the pendency of the suit, to the effect that plaintiff had been compelled, by her husband's cruel and inhuman treatment and failure to make any provision for her support, to abandon him; that she was wholly destitute and owned no property except a small house and lot from which she derived an income of but little more than enough to pay repairs and taxes thereon, and that defendant was worth almost \$10,000 and amply able to pay such sum, was sufficient to sustain the action of the court in making such allowance. *Ib.*

3. *Allowance Made to Wife During Pendency of Action.—Answer.*—An answer by defendant to an application by plaintiff for an allowance for her support during the pendency of a divorce proceeding, alleging that he had furnished a house and proper support for plaintiff and that he was willing for her to return to his home, and that he would furnish her with comfortable maintenance, was properly disregarded by the court where plaintiff alleged in her complaint that she had been compelled by her husband's cruel and inhuman treatment, and by his failure to make any provision for her support, to abandon him. *Ib.*

DRAINS—

1. *Assessment Liens.—Estoppel.*—Where the owner of property assessed with benefits for a public ditch, under color of law, had notice of the petitions and assessments, and of the various steps as required by law for the construction of public ditches and made no objection or complaint against such proceeding, and during the progress thereof joined in a petition to the board of commissioners asking for an extension of time for the payment of the first installment of the assessments, which was granted, he cannot, after the completion of the ditch and after his receipt of benefits therefrom, deny the authority under which such improvements and assessments were made.

Board, etc., v. Plotner, 116.

2. *Injunction.*—For the purpose of preventing threatened injury to land and avoiding a multiplicity of damage suits therefor, one may be restrained from flooding the lands of another with waters that would not naturally flow thereon.

Drake v. Schoenstedt, 90.

3. *Injunction*.—Where a drain was constructed under the provision of section 5656, Burns' R. S. 1894 (4286, R. S. 1881), and a forty-acre tract of land was assessed, with benefits, for the drainage of two acres of such tract, the owner thereof will be restrained from draining additional portions of such forty-acre tract by lateral ditches into such drain, where it is shown that such waters naturally flow in another direction, and that such drain is insufficient to carry such additional water without damage to other landowners whose lands are drained by such ditch. *Id.*

EASEMENTS—

1. *Private Roads*.—*Way of Necessity*.—*Partition*.—Where in the partition of real estate the portion set off to one of the parties is not accessible to a highway without passing over lands partitioned to another, and no provision is made in such proceedings for any right of access to such highway, such right of way attaches to the land the same as if express provision had been made therefor in the report of the commissioners and decree of court.

Ritchey v. Welsh, 214.

2. *Way of Necessity*.—*Partition*.—A party to a partition proceeding may have an easement in lands partitioned to another in such proceeding for a way of necessity across such land to a public highway, but he is not by virtue thereof entitled to an easement for such purpose in other lands set off to such person in a prior proceeding in partition of lands of another common ancestor. *Id.*

3. *Private Roads*.—*Way of Necessity*.—Where one having an easement in the lands of another for a private way, and the same is to be located for the first time, no prior use thereof having been made, the owner of the land over which it is to pass has the right to choose it, provided he does so in a reasonable manner; but if the owner of the land fail to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate, and when once selected it cannot be changed by either party without the consent of the other. *Id.*

EJECTMENT—

1. *Jurisdiction*.—*Collateral Attack*.—Where in an action in ejectment by one claiming title through an administrator against an heir of decedent, a finding by the court that notice of the pendency of the petition to sell was published, and found by the court to be sufficient, although it is not found that such heir was named as defendant, and as such included in the service of process or publication, sufficiently shows jurisdiction over the person of defendant in such suit for the purposes of the suit in ejectment.

Boyer v. Robertson, 74.

2. *Description of Real Estate*.—A judgment for plaintiff will be set aside in an action in ejectment involving the title of the real estate, where neither the complaint nor findings of the jury supply facts sufficient from which a judgment could be rendered containing a sufficient description of the real estate. *Id.*

ELECTIONS—Power of county auditor to give casting vote in election of county superintendent, see **OFFICERS, 2**; *State, ex rel. Morris, v. McFarland, 266.*

EMINENT DOMAIN—

Railroads.—*Municipal Corporations*.—*Condemnation of Railroad Right of Way*.—The exercise of the power of eminent domain by

a municipal corporation in the condemnation of the right of way and grounds of a railroad company operating under a special charter, for streets, under the authority of the State, is not an interference with the inviolability of contracts, for the reason that all contracts are made subject to the right of eminent domain.

City of Terre Haute v. Evansville, etc., R. R. Co., 174.

EMPLOYERS' LIABILITY ACT—Exemptions from fellow servant rule under provision of, see NEGLIGENCE, 2, 3; *Baltimore, etc., R. W. Co. v. Little, Admr., 167.*

ESTOPPEL—A person who abides the judgment of the court without appeal is estopped from attacking such judgment in a collateral proceeding, see FORMER ADJUDICATION; *Thomas v. Thompson, 391.*

A defendant who did not appear in a partition proceeding is not estopped from asserting title to land held by an unrecorded deed which was set off to a codefendant, see PARTITION; *Finley v. Cathcart, 470.*

When property owner is estopped from objecting to assessments for street improvements, see MUNICIPAL CORPORATIONS, 7; *City of Bloomington v. Phelps, 596.*

Judgment for costs in an action in ejectment cannot operate as an estoppel against the defendants in an action by plaintiff to quiet title to such real estate, see QUIETING TITLE, 5; *Graham v. Lunsford, 83.*

Of the owner of property assessed with benefits for a public ditch from denying the authority under which such assessments were made, see DRAINS, 1; *Board, etc., v. Plotner, 116.*

1. *Pleading.—Sufficiency.*—Where an estoppel is relied upon it must be pleaded with particularity and precision, and nothing can be supplied by intendment, and when there is ground for inference or intendment, it will be against, and not in favor of the estoppel.

Dudley v. Figg, 363.

2. *Parties.*—Only parties and their privies are bound by or can take advantage of an estoppel, and one who insists upon the acts of another working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if the other is permitted to withdraw or deny the act.

Ib.

3. *By Conduct.*—To constitute a valid estoppel by conduct, there must be knowledge on the part of the person to be estopped, and there can be no estoppel when there is notice or knowledge on the part of the person relying upon the estoppel.

Franklin Nat'l Bank v. Whitehead, 560.

EVIDENCE—As to public utility of highway, see HIGHWAYS, 1, 2, 8, 4, 5; *Fritch v. Patterson, 455; Opp v. Timmons, 236.*

When statements made by injured party are admissible in a criminal prosecution, see CRIMINAL LAW, 9; *Shields v. State, 395.*

Written statement which is claimed to be the basis of action can not be admitted in evidence unless pleaded, see PLEADING, 9; *Durflinger v. Baker, 375.*

Showing that the killing was intentional is admissible in a trial

under an indictment in two counts charging murder in the first degree and involuntary manslaughter, see *CRIMINAL LAW*, 6; *Siberry v. State*, 684.

The admission of evidence in a prosecution of a husband for killing his wife showing that deceased was true to her husband is not reversible error where the indictment was in two counts charging murder in the first degree and involuntary manslaughter, and the conviction was on the latter charge, see *CRIMINAL LAW*, 7; *Ib.*

1. *Objection to Admission.—When Evidence not in Record.—Bill of Exceptions.*—A specification of error based upon the admission of evidence contrary to the provisions of section 507, Burns' R. S. 1894 (499, R. S. 1881), in the trial of an action by heirs affecting title to the ancestor's property, presents no question, where neither the complaint nor the evidence is in the record, and no statement is made in the bill of exceptions as a ground for objection that the action was of the character contemplated by said statute. *Dunn v. Dunn*, 424.
2. *Exception to Admission Of.—Objections Must be Specific.*—Objections made to the admission of evidence must be specific, objections made on the ground that the evidence is irrelevant, incompetent, and immaterial present no question for review. *Müller v. Dill*, 326.
3. *Weight Of.—Conflicting Evidence.—Criminal Law.*—Where in the trial of a criminal cause there was evidence given sustaining every material allegation in the indictment the Supreme Court will not reverse the cause because of conflicts therein upon some points. *Shields v. State*, 395; *Siberry v. State*, 684.
4. *Weight Of.*—Where there is evidence sufficient to support the finding of the trial court the Supreme Court will not weigh the evidence for the purpose of ascertaining the preponderance thereof. *Fritch v. Patterson*, 455; *Hannan v. State*, 81; *Müller v. Dill*, 326.
5. *Written Contract Not Pleaded.*—Where a defense to an action sounds in contract, and the contract was in writing and not pleaded in the cause, such defense is a question of law that should have been presented by the pleadings, and not being pleaded was not in issue. *Durfinger v. Baker*, 375.
6. *Hearsay Evidence.—Admissibility Of.—Tax Sales.—Action to Enjoin.*—In the trial of an action to enjoin the sale of real estate for delinquent taxes, evidence by plaintiff that prior to the purchase of such property he was informed by the deputy treasurer, since deceased, that such taxes had been paid, was properly admitted. *Keesling, Treas., v. Powell*, 372.
7. *Action to Cancel Note.—Forgery.—Sufficiency of Evidence to Sustain Judgment.*—In an action to cancel a note on the ground that same was forged, evidence that the blank upon which the note was written was printed almost two years after the alleged execution of the note was sufficient of itself to sustain a judgment canceling such note. *Müller v. Dill*, 326.
8. *Action to Cancel Note as a Forgery.—Slander.*—Where in the trial of an action to cancel a note as a forgery, defendant introduced evidence to the effect that plaintiff had uttered a slander against defendant by stating, in effect, that she was pregnant, and that when threatened with a suit for such slander, he had executed the note in suit and delivered it to her as genuine in settlement of

her supposed damages, evidence going to show that at the time the alleged slander was uttered, defendant was in fact pregnant, was properly admitted for the purpose of determining the influences inducing plaintiff to execute the note. *Ib.*

9. *Action to Cancel Note.—Forgery.*—In an action to cancel a note alleged to have been forged, evidence that defendant sold to witness a forged note and afterward went to the office of witness disguised and offered to sell him the note in suit was competent as a link in the chain of circumstances tending to show defendant's guilty knowledge of the forgery of the note. *Ib.*
10. *Action to Cancel Note.—Cross-Examination.—Forgery.*—In an action to cancel a note on the ground that the same was forged, it was improper to ask a party plaintiff, on cross-examination, whether he had not heard his co-plaintiff make statements affecting the chastity of defendant, on the theory that the note in suit was executed by said plaintiff in compromise of a contemplated slander suit based upon such statement, where the examination in chief had not involved any inquiry as to said statement. *Ib.*
11. *Action to Cancel Note.—Forgery.*—In the trial of an action brought to cancel a note on the ground of forgery, it is improper to show that plaintiff conveyed property held by him at the time of the alleged execution of the note, on the theory that plaintiff executed same to compromise and avoid a slander suit, and conveyed his property for the purpose of defeating the collection of the note, as there can be no inference from the mere conveyance of property that the grantor is a debtor. *Ib.*
12. *Action to Cancel Note.—Forgery.*—In a suit to cancel a note on the ground of forgery, evidence offered to the effect that plaintiff and witness had talked about the note several times, and plaintiff had never denied its execution was properly rejected, where there was nothing in the evidence disclosing the character of such conversation from which it could be ascertained whether any reason existed for the denial of the execution thereof. *Ib.*
13. *Quieting Title.—Declarations Made at Time of Conveyance.*—In an action to quiet title to real estate declarations made as a part of the negotiations leading up to a reconveyance of the real estate by a trustee were admissible as tending to show the reason why the deed of reconveyance was executed. *Ewing v. Bass, 1.*
14. *Waiver of Objections.*—Where a party in the trial of an action to quiet title to real estate introduces declarations made by the grantor relative thereto, after the execution of such deed, he cannot complain of the introduction in evidence by his adversary of declarations made by the parties at the time of the execution thereof. *Ib.*

EXEMPTIONS—

1. *Act of 1897 Construed with General Exemption Law.—Garnishment.*—Construing the provision of the act of 1897 (Acts 1897, p. 233), that the wages of householders, not exceeding \$25.00 shall be exempt from garnishment, with the general exemption law allowing to resident householders an exemption of \$600.00, and the latter applies to resident householders and the former to householders who are not resident householders, but are householders in some other jurisdiction. *Pomeroy v. Beach, 511.*
2. *Garnishment.—Act of 1897 Construed.*—The provision of the act of 1897 (Acts 1897, p. 234), that "no exemption shall be allowed against garnishment except as in this section provided" means that no exemption shall be allowed against garnishment to householders other than resident householders, except as provided therein. *Ib.*

3. *Constitutional Law*.—A law allowing resident householders an exemption of \$600.00 and householders of another state an exemption of but \$25 00 is not unconstitutional as the legislature has the right to make such classification. *Ib.*
4. *Liberality of Construction*.—*Constitutional Law*.—The constitutional provision relating to exemptions and the statutes passed pursuant thereto are based upon considerations of public policy and humanity and should be liberally construed. *Ib.*
5. *Sales*.—*Judgment Liens*.—*Quieting Title*.—Where the entire estate of a resident householder, exclusive of valid mortgage liens, does not exceed in value \$600.00, he may sell or dispose of any or all of his property, and the purchaser thereof will take it free from the lien of judgments founded on contract, or the lien of an execution that may have issued thereon, and an action may be maintained by the purchaser to quiet title of such real estate against the lien of such judgments, provided suit is commenced for that purpose before the real estate is sold under the judgments.

Citizens, State Bank v. Harris, 208.

EXPERT TESTIMONY—

1. *Forgery*.—No error is committed in refusing to permit an expert witness to testify that a forger, in disguising and imitating hand-writings, is more particular at the beginning than at the closing of such effort. *Miller v. Dill, 326.*
2. *Action to Cancel Note*.—*Forgery*.—No error was committed in the trial of an action to cancel a note as a forgery in permitting witnesses to testify to the genuineness of plaintiff's signature to bank checks, which were not papers in the case and not admitted to be genuine, where no comparisons were made, and where the signatures so proved were rejected as evidence. *Ib.*

FALSE PRETENSES—

Sufficiency of Affidavit and Information.—It is an indispensable requisite to the validity of an affidavit and information charging one with obtaining money by means of false pretenses, that there should be an absolute and direct negative of the material pretenses upon which the State bases the charge, and which it expects to prove and rely upon for a conviction. *Funk v. State, 338.*

FEES AND SALARIES—As to appeal from an order of trial court in a proceeding for the construction of a fee and salary law, see **APPEAL AND ERROR, 36**; *In re Petition of Stroh, Sheriff, 164.*

FELLOW SERVANT—As to distinction between fellow servant and vice principal, see **MASTER AND SERVANT, 3**; *Kerner, Admx., v. Baltimore, etc., R. W. Co., 21.*

Exemption from fellow servant rule under Employers' Liability Act, see **NEGLIGENCE, 2, 3**; *Baltimore, etc., R. W. Co. v. Little, Admx., 167.*

Action for damages for personal injuries caused by incompetent fellow servant, see **NEGLIGENCE, 1, 2, 3**; *Peterson v. New Pittsburgh Coal, etc., Co., 260*; *Baltimore, etc., R. W. Co. v. Little, Admx., 167.*

FORGERY—Sufficiency of evidence in an action to cancel note on the ground of forgery, see **EVIDENCE, 7, 8, 9**; *Miller v. Dill, 326.*

FORMER ADJUDICATION—

Judgment.—*Collateral Attack*.—*Estoppel*.—A devisee of real estate,

who, after obtaining a decree partitioning and quieting title thereto, is made defendant in an action brought by the administrator of the devisor to sell such real estate for the payment of debts and the widow's claims, to which proceedings she pleaded the former suit and was defeated and abided the judgment of the court without appeal, is estopped from attacking in a collateral proceeding against the purchaser, the order of sale made therein.

Thomas v. Thompson, 391.

FRAUDULENT CONVEYANCES—

Inadequate Consideration. — Innocent Purchaser. — Husband and Wife. — Equity of Wife.—A conveyance of real estate worth \$8,000.00 for a consideration of \$650.00, made by a husband to his wife to defraud his creditors will be set aside as fraudulent, upon such conditions as will protect the wife's interests therein, in an action by *bona fide* creditors of the husband, although the wife had no actual knowledge of her husband's fraud.

First Nat'l Bank of Frankfort v. Smith, 443.

GAMING—See SALES.

GARNISHMENT—Constitutionality of the Garnishment Law of 1897, see **EXEMPTIONS**, 8; *Pomeroy v. Beach, 511.*

Affidavit in Attachment. — Act of 1897 Construed.—Construing the act of 1897 (Acts 1897, p. 238), with the code of civil procedure of 1881 concerning proceedings in attachment it is evident that it was not the legislative intent that anyone should be authorized to commence proceedings in garnishment, and obtain a summons, without filing an affidavit in attachment, either at the time or before he filed his affidavit in garnishment. *Ib.*

HIGHWAYS—See **STREETS**. As to private way of necessity, see **EASEMENTS**, 1, 2, 3; *Ritchey v. Welsh, 214.*

1. *Establishment. — Evidence of Public Utility.*—The ultimate fact of public utility in a proceeding to locate and establish a public highway, on appeal from the board of commissioners to the circuit court, is to be determined from all the evidence relative thereto by the court or jury trying the issue, and it is not necessary that such fact be proved by direct evidence, but it may be inferred from all the legitimate facts and circumstances in evidence.

Fritch v. Patterson, 455.

2. *Establishment. — Evidence of Public Utility.*—It is not essentially requisite in a proceeding to locate and establish a public highway that it be shown that the proposed road will be used by the whole community or by a large part thereof, if it appears that the road will be of public convenience, the mere fact that it will specially facilitate the convenience of one or more persons over that of others, will not deprive it of its public character or utility. *Ib.*

3. *Establishment. — Necessity. — Evidence of Public Utility.*—Where it is shown by the evidence that public convenience requires that a proposed highway be established it will be held to be of public utility although it may not appear to be of absolute necessity. *Ib.*

4. *Establishment Of. — Utility.*—The fact that a highway sought to be established includes a traveled way which otherwise might become a highway by use could not affect the question of utility.

Opp v. Timmons, 236.

5. *Utility.*—Existing ways, the condition of population, location of markets, character of soil, and physical features of the locality are proper subjects of inquiry in determining the utility of a highway sought to be established. *Ib.*

6. *Streets.—Railroads.—Street and Railroad Crossings.—Municipal Corporations.*—A railroad company is required by statute to construct crossings over its tracks where the same crosses the streets of an incorporated town, and the failure of a town to enact an ordinance requiring a railroad company to construct such crossing will not relieve the company of such duty.
Evansville, etc., R. R. Co. v. State, ex rel., 276.
7. *Street and Railroad Crossings.—Municipal Corporations.*—The duty of a railroad company to construct street crossings over its tracks is the same whether the street or highway was opened before or after the railroad was built. *Ib.*
8. *Railroads.—Street Crossings.—Complaint to Require Construction of Crossing.—Municipal Corporations.*—A complaint against a railroad company by an incorporated town to require it to construct street crossings across its tracks which alleges the refusal of such company to construct the crossings, need not allege a demand upon the part of the town. *Ib.*
9. *Railroads.—Street and Railroad Crossings.—Complaint to Require Construction of Crossing.—Municipal Corporations.*—Where a complaint in an action against a railroad company to require it to construct street crossings over its tracks alleged that such company built, operated, and maintained its tracks, sidetracks, and switches along and across such streets, it was not necessary for the proof or findings of the court to show that the streets were public highways and that the railroad was built across them, as it is immaterial whether the streets became such before or after the railroad was built. *Ib.*

HOMICIDE—See CRIMINAL LAW.

HUSBAND AND WIFE—When conveyance of real estate from husband to wife will be set aside on account of inadequate consideration, see FRAUDULENT CONVEYANCES; *First National Bank v. Smith, 443.*

1. *Antenuptial and Postnuptial Contracts as to Wife's Real Estate.*—The husband's interest in his wife's real estate during marriage and his right of inheritance under the statute may be waived by an agreement either antenuptial or postnuptial. *Leach v. Rains, 152.*
2. *Postnuptial Contract as to Wife's Real Estate.—Waiver of Husband and Wife of Right to Inherit from Each Other.*—Where a wife, through a trustee, conveyed one-half of her real estate to her husband, and by the terms of the deed released her right to inherit such real estate from her husband should she survive him, and the husband made to his wife a similar deed conveying to her his interest in the other half of her real estate, the husband and wife both joining in the deeds to the trustee, and the husband accepted the deed, and took and held possession of the real estate conveyed to him, receiving the rents and profits thereof for more than ten years, until the death of his wife, the covenant releasing his right of inheritance is binding on the husband whether the wife had the power to waive her right to inherit or not. *Ib.*
3. *Postnuptial Agreement as to Wife's Real Estate.—Simultaneous Deeds Construed Together When a Part of Same Transaction.*—A husband and wife, for the purpose of making a marriage settlement, joined in a deed of conveyance of the wife's real estate to a trustee. The deed contained the clause "each of the grantors does release any and all interest in the tract so conveyed to the other, which is now or might hereafter exist on account of the marital relations of the two." The trustee reconveyed sep-

arate parts of the real estate to the husband and the wife. *Held*, upon the death of the wife prior to the death of the husband, that the husband's right of heirship thereto, under section 2651, Burns' R. S. 1894, was barred by the deed he and his wife had executed. *Held*, also, that the three deeds were a part of the same transaction, and must be construed together. *Ib.*

4. *Contract of Suretyship.—Building and Loan Association.—Mortgage.—Foreclosure.*—Where a mortgage executed by a husband and wife on real estate held by them as tenants by entireties to a building association, conditioned that if the husband, who was a member of such association, and the holder of two shares of stock therein, upon which had been advanced to him the sum of \$1,000.00, would pay to said association certain stipulated sums per week, until the dues paid should equal the amount advanced, or until the dissolution of such company, then such obligation should be void, such mortgage did not secure the repayment of the money advanced, but only secured the payment of the weekly dues, interest, premiums, fines, and assessments, as therein specified, of the husband as a member of such association, and such mortgage was, as to the wife, a contract of suretyship, and void under the provisions of section 6964, Burns' R. S. 1894 (5119, R. S. 1881).

Harrison Building, etc., Co. v. Lackey, 10.

5. *Mortgage of Lands Held by Entireties.—Suretyship.*—A mortgage executed by a husband and wife on lands which were held by them as tenants by entireties, but which had been conveyed to the husband through a trustee, to secure the individual debt of the husband, is but an evasion of the statute forbidding the wife to enter into contracts of suretyship, and void, where such deeds and mortgage were in fact one transaction, notwithstanding the mortgagee stated to the wife prior to the execution of the deed that she must, in order to make the mortgage valid, make an absolute gift of the land to her husband, where there is no evidence to show that she intended by the deed to make an absolute gift thereof, but that the land was conveyed back to them jointly after the execution of the mortgage.

Grzesek v. Hibberd, Tr., 354.

INDETERMINATE SENTENCE LAW—Is not an invasion of the right to a trial by jury, see **CRIMINAL LAW**, 12; *Skelton v. State*, 641; *Miller v. State*, 607.

Is not invalid as attempting to devert the judicial department of its powers and confer same on the board of managers of the Indiana Reformatory, see **CRIMINAL LAW**, 15; *Miller v. State*, 607.

A verdict simply stating the age of defendant and that he is guilty as charged in the indictment without fixing the punishment is authorized by the Reformatory Act, see **CRIMINAL LAW**, 11; *Skelton v. State*, 641; *Miller v. State*, 607.

The provision of the indeterminate sentence law placing defendant in the custody of the board of managers of the Indiana Reformatory to be confined by such board not less than the minimum time and not more than the maximum time prescribed by statute is not in conflict with the constitutional provision that cruel and unusual punishment shall not be inflicted, etc., see **CRIMINAL LAW**, 16; *Miller v. State*, 607.

The failure of the court to fix the minimum punishment in a sentence under the indeterminate sentence law is not error of which

defendant can complain, see **CRIMINAL LAW**, 13; *Skelton v. State*, 641.

The failure of the court to assess disfranchisement as part of the punishment under the indeterminate sentence law is not error of which defendant can complain, see **CRIMINAL LAW**, 14; *Miller v. State*, 607.

INDICTMENT—The charge must be preferred with certainty, see **CRIMINAL LAW**, 3; *Funk v. State*, 338.

The question of misjoinder of counts cannot be presented on appeal where the record does not show a motion to quash to have been made, see **CRIMINAL LAW**, 1; *Siberry v. State*, 684.

INJUNCTION—When possession of city property will be protected by, see **MUNICIPAL CORPORATIONS**, 12; *City of Huntington v. Cast*, 255.

When collection of judgment may be enjoined, see **JUDGMENT**, 3; *Fitch v. Byall* 554.

To restrain one from flooding land with waters that would not naturally flow thereon, see **DRAINS**, 2, 3; *Drake v. Schoenstedt*, 90.

It is no defense to a prosecution for a contempt of court in violation of an injunction that the officers of the company enjoined acted in good faith, see **CONTEMPT**; *Thistlethwaite v. State*, 319.

1. *Municipal Corporations.—Extension of Street Over Railroad Right of Way.—Jurisdiction.*—An injunction will lie to prevent a city from extending a street over and across the freight yard and tracks of a railroad company already devoted to public use, where the city has no authority to make such extension.

City of Terre Haute v. Evansville, etc., R. R. Co., 174.

2. *Condemnation Proceedings.—Notice.—Opening Street.—Statute Construed.*—An injunction will lie to prevent the taking of land by a city for a street, under sections 3623, 3629 *et seq.*, Burns' R. S. 1894, where the owner thereof had no notice of the condemnation proceedings, and was not made a party thereto, notwithstanding the provisions of sections 3636 and 3644, Burns' R. S., 1894, for assessment and payment of damages which have not been assessed to persons who have had no notice of such proceedings, and providing that no injunction shall lie to restrain such proceedings unless property is sought to be appropriated upon which damages have been assessed and not paid or tendered.

City of Fort Wayne v. Fort Wayne, etc., R. R. Co., 25.

INSTRUCTIONS—The act of March 8, 1897, providing that the original bill of exceptions embracing the evidence may, on appeal, be certified as a part of the record, does not apply to the instructions, see **APPEAL AND ERROR**, 21; *Leach v. Mattix*, 146.

An erroneous instruction as to the charge of larceny is not available error for the reversal of a judgment finding the defendant guilty of burglary, see **CRIMINAL LAW**, 10; *Hart v. State*, 585.

1. *Numbering and Signing.*—It is the duty of the trial judge, under section 1892, Burns' R. S. 1894 (1823, Horner's R. S. 1897), to number and sign instructions given by him in the trial of a cause, yet a failure to do so will not authorize the reversal of the cause.

Shields v. State, 395.

2. *Refusal to Give.*—No error is committed in refusing to give requested instructions which were substantially given by the court of its own motion. *Siberry v. State, 684.*
3. *Refusal to Give. — Defective Record.*—The refusal to give requested instructions is not available error where the record does not affirmatively show that the instructions purporting to have been given by the court were all the instructions given in the cause. *Baltimore, etc., R. W. Co., v. Conoyer, 524.*
4. *Erroneous Instruction. — Harmless Error.*—The giving of an erroneous instruction is not reversible error when it appears that the substantial rights of the complaining party were not prejudiced thereby. *Shields v. State, 395.*
5. *Inaccuracies. — Technical Errors.*—Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no grounds for reversal, when they result in no substantial harm to the complaining party, if the instructions, taken together, correctly state the law applicable to the facts of the case. *Ib.*
6. *Must Be Considered Together.*—Instructions are considered as an entirety, and not separately or in dissected parts, and even if some particular instruction, or some portion of an instruction, standing alone or taken abstractly, and not explained or qualified by others, be erroneous, it will afford no grounds for reversal. *Ib.*
7. *Remedy When Not Sufficiently Specific.*—Where an instruction is not sufficiently specific, it is the duty of the aggrieved party to tender a proper instruction and request that the same be given. *Baltimore, etc., R. W. Co. v. Conoyer, 524.*
8. *When Party Estopped from Objecting to an Irrelevant Instruction.*—Where a party asks and the court gives an irrelevant instruction, he is estopped from objecting to an amendment by the court of another instruction tendered by him, which amendment does nothing more than to add to the objectionable charge requested in the first instance. *Ib.*
9. *Criminal Law. — Harmless Error. — Homicide.*—Errors committed in giving or refusing to give instructions concerning the offense of murder in the first and second degree, in the trial of a criminal cause, were harmless where the defendant was convicted of manslaughter. *Shields v. State, 395.*
10. Where error is assigned in giving certain instructions all of the instructions given must be set out in the transcript. *Hannan v. State, 81.*
11. *Joint Assignment of Error.*—Where error is assigned jointly to the giving of two instructions, both instructions must be bad or the assignment will not be available. *Ib.*
12. *Reasonable Doubt. — Inaccurate Definition. — Harmless Error. — Criminal Law.*—In order to justify the reversal of a case on the ground that the court in its instruction gave an inaccurate definition of reasonable doubt, it must plainly appear that defendant was prejudiced in his substantial rights thereby. *Siberry v. State, 684.*
13. *Appeal and Error. — Bill of Exceptions.*—The instructions must be embraced in a bill of exceptions and signed by the judge in order to become a part of the record on appeal. *Hannan v. State, 81.*
14. *Weight of Evidence. — Criminal Law.*—An instruction to the jury in the trial of a person charged with manslaughter, to the

effect that the jury might consider statements made by defendant that he committed the homicide as strong proof against defendant in determining the fact as to whether he did commit the homicide or not was not such an invasion of the right of the jury to determine the weight of the evidence as would amount to reversible error, where the defendant admitted the killing, and other instructions were given defining criminal homicide.

Siberry v. State, 684.

15. *Criminal Law.—Assault and Battery.*—An instruction in the trial of a cause of an assault and battery with intent to commit murder is not bad for failure of the court to use the word unlawful in referring to the touching of deceased by defendant, where the elements stated therein were such that when applied to the evidence and construed with the other instructions as a whole, the jury were not misled as to the essential elements of the offense of assault and battery.

Shields v. State 395

16. *Criminal Law.—Manslaughter.*—An instruction that if the jury found from the evidence, beyond a reasonable doubt, that defendant, without malice, express or implied, and without premeditation, but voluntarily, upon a sudden heat took the life of deceased, in manner and form as charged in the indictment, they should find him guilty of voluntary manslaughter is not bad for failure to use the word unlawfully before the word took, where the indictment charged that defendant unlawfully, feloniously, and purposely killed and murdered deceased.

Ib.

17. *As to Character of Accused.—Criminal Law.*—An instruction to the effect that in doubtful cases evidence of good character is conclusive in favor of the party accused of the crime is improper, as under the law the jury are the exclusive judges of the facts and of the credibility of the witnesses, and if they have a reasonable doubt of the guilt of the accused he must be acquitted whether there is any evidence of his good character or not.

Ib.

INTERROGATORIES TO JURY—How alleged errors in submission of, are made available on appeal, see **APPEAL AND ERROR, 28**; *New York, etc., R. R. Co. v. Hamlet Hay Co., 344.*

JUDGMENT—When defendant is not bound by a judgment in partition, see **PARTITION**; *Finley v. Cathcart, 470.*

As to excessive judgment, see **APPEAL AND ERROR, 32**; *New York, etc., R. R. Co. v. Hamlet Hay Co., 344.*

When devisee is estopped by a judgment ordering sale of real estate from attacking in a collateral proceeding such order of sale, see **FORMER ADJUDICATION**; *Thomas v. Thompson, 391.*

1. *Judgment Taken Before Justice of Peace.—Excusable Neglect.—Relief.*—Relief, after thirty days, from a judgment taken by default before a justice of the peace, is by a proceeding in the circuit court for a new trial, under section 1571, Burns' R. S. 1894 (1508, R. S. 1881).

Fitch v. Byall, 554.

2. *Relief From Judgment Taken Before Justice of Peace Through Excusable Neglect.—Statute Construed.*—Section 399, Burns' R. S. 1894 (396, R. S. 1881), providing relief from a judgment taken through mistake or excusable neglect, is not applicable to judgments taken before a justice of the peace; and the filing of a transcript of such judgment in the office of the clerk of the circuit

court will not make it a judgment of the circuit court, or give such court authority to grant relief therefrom. *Ib.*

3. *When Collection of Judgment May be Enjoined.* The collection of a void judgment may be enjoined, but not so where it is merely irregular or erroneous. *Ib.*
4. *Collateral Attack.*—The judgment of a justice of the peace is not open to collateral attack, where the defendant is a resident of the township in which the suit is brought, and the facts necessary to confer jurisdiction over the person of the defendant appear affirmatively upon the face of the record. *Ib.*
5. *Action to Review.—Complaint.*—A complaint in an action to review a judgment must contain in the body thereof enough of the pleadings in the cause sought to be reviewed, or the substance, nature or character thereof, to present the question of the alleged error without resorting to the transcript of the record thereof filed with the complaint as an exhibit.

Jamison v. Lake Erie, etc., R. R. Co., 521.

JUDICIAL NOTICE—

Census.—Courts will take judicial notice of a census or other enumeration made under the authority of the State or of the United States. *City of Huntington v. Cast, 255.*

JURISDICTION—Of all parties in interest must be acquired before Supreme Court will proceed to adjudicate an action on appeal, see **APPEAL AND ERROR**, 7; *Abshire v. Williamson, 248.*

A receiver of a corporation may, in an action against the stockholders to collect unpaid assessments on capital stock, join all in one suit, though they live in different counties, see **RECEIVERS**, 4; *Gainey v. Gilson, Rec., 58.*

JURY—

1. *Qualifications of Jurors.—Examination.—Exceptions.—Criminal Law.*—To present properly any question as to the qualifications of a juror to sit in a criminal cause, some one or more of the statutory causes provided by section 1862, Burns' R. S. 1884 (1793, Horner's R. S. 1897), must be stated to the trial court; an objection stated in general is properly overruled. *Shields v. State, 395.*
2. *Disqualification of Juror.—Reading Newspaper Accounts of Former Trial.*—To render a juror incompetent on account of having read newspaper accounts of a former trial of the cause it must be shown that the account read was a report of the evidence. *Siberry v. State, 684.*
3. *Qualification of Jurors.—Examination.—Question of Fact.*—The Supreme Court will not interfere with the determination of the trial court of the question concerning the qualification of jurors involving questions of fact, merely because the answers of the juror are, or seem to be, inconsistent or incoherent. *Shields v. State, 395.*
4. *Challenge for Cause.—Peremptory Challenge.—Harmless Error.—Criminal Law.*—Where the court overrules defendant's challenge made to two jurors for cause, and such jurors were afterward excused on defendant's peremptory challenge and defendant went to trial without exhausting all of his peremptory challenges, such ruling did not prejudice the substantial rights of defendant and was harmless. *Siberry v. State, 684.*

LIENS—See **MORTGAGES**. In an action to enforce lien on real estate

by infant legatees after arrival at full age no demand need be alleged, see COMPLAINT 1; *Richards v. Reeves*, 427.

1. *On Personal Property.—How Given by Creditor.*—There is no mode, under the law of this State, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property, retaining its possession, can give another a lien upon it that can be enforced against any person except the parties thereto.

Franklin Nat'l Bank v. Whitehead, 560.

2. *Junior Lien Holder.—Marshaling of Senior Liens.*—A junior lien holder cannot complain as to the order of marshaling liens senior to his own.

Wayne Inter. Bldg. and Loan Ass'n v. Moats, 123.

LIMITATION OF ACTIONS—When statute begins to run against action for maintaining a nuisance, see NUISANCE; *Peck v. City of Michigan City*, 670.

1. *Pleading.—Action by State.—Party in Interest.—How Determined.*—Where the statute of limitations is pleaded in an action where the State is plaintiff the court must determine from the entire record whether the action seeks to enforce a public right, in the interest of the public, or a private right, for the benefit of a private person.

State, ex rel. v. Halter, 292.

2. *When Applicable to Actions Brought by State.*—Section 805, Burns' R. S. 1894 (304, R. S. 1881), providing that limitations of actions shall not bar the State of Indiana, except as to sureties, applies only when the action is by the State in its own interest or in the interest of the public, and has no application where the State is but a nominal party.

Ib.

3. *Descent and Distribution.—Debt Due Estate by Heir Not Barred by Statute of Limitation.*—The statute of limitation cannot be interposed by an heir as a defense to an application by the administrator to apply a portion of his distributive share of such estate to the payment of a note of such heir in favor of the estate.

Holmes v. McPheeters, Admr., 587.

4. *Concealment of Action.—Discovery.*—Where the operation of the statute of limitation is suspended by section 301, Burns' R. S. 1894 (300, R. S. 1881), by the concealment of the cause of action, the statute does not begin to run until after the discovery of the cause of action, or from the time the discovery thereof by the exercise of ordinary diligence might have been made.

Jackson v. Jackson, 233.

5. *Concealment of Action.—Fraud.*—The concealment of a cause of action within the meaning of section 301, Burns' R. S. 1894 (300, R. S. 1881), arises out of fraud, and while the fraud in a given case may be sufficient to give to the complaining party a right of action, it may not in the same case be also sufficient to serve to conceal the cause of action within the contemplation of the law.

Ib.

6. *Concealment of Action.*—Where a concealment of the cause of action is pleaded in reply to an answer pleading the statute of limitation, alleging that defendant made false representations concerning the transaction on which the suit was founded, and requested plaintiff to keep the transaction secret, it must also be alleged that plaintiff relied upon the alleged false representations, believing them to be true, and was thereby prevented from making any inquiry or investigation relative to their truth or falsity.

Ib.

7. *Concealment of Action.—Statute Construed.*—To bring a case within the provision of section 301, Burns' R. S. 1894 (300, R. S. 1881), providing that if any person liable to an action shall conceal the

fact from the knowledge of the person entitled thereto the action may be commenced at any time within the period of discovery of the cause of action, it must be alleged that some trick or artifice was resorted to, or some material fact misstated to or concealed from the party to prevent the discovery thereof. *Ib.*

8. *Concealment of Action.—Time of Concealment.*—The acts constituting the concealment of a cause of action in such manner as to operate in the suspension of the statute of limitation, as provided by section 801, Burns' R. S. 1894 (800, R. S. 1881), need not be subsequent to the accruing of the cause of action, but may be concurrent therewith, or even precede it, provided that they are of such a character as to operate after the time when the cause of action accrued and thereby prevent its discovery, and were so designed and intended by the concealer. *Ib.*
9. *Trusts.*—Express or direct and continuing trusts are not within the statute of limitations. *Jones, Exr., v. Henderson, 458.*
10. *Trusts.—Action to Recover Trust Funds.*—A trust deed or mortgage executed by a water works company to trustees, conditioned that all money that the trustees at any time might derive from any of the mortgaged property or "from the foreclosure and sale thereof shall be held by them as trustees for the benefit of all bondholders of said bonds *pro rata*" created a trust relation, not only as to the property and the foreclosure of the mortgage, but also as to the reception and holding of the proceeds of the sale under such foreclosure, and while such relation existed the possession of the trustees is regarded as that of the *cestuis que trust* and the statute of limitation will not operate as a bar to an action by the *cestuis que trust* for the recovery of such funds. *Ib.*
11. *Trusts.—Laches.*—Laches by a *cestui que trust* to constitute a bar to an action against the trustee for the recovery of the trust funds arises from conduct inconsistent with the existence of the trust, or the continuance of the trust relationship, and never obtains where the existence and continuance of the trust are undoubted. *Ib.*

LIS PENDENS—

Banks and Banking.—Where a bank pays out money on deposit after notice of a suit contesting the ownership thereof, it does so at its peril. *Pearce v. Dill, 136.*

LONGHAND MANUSCRIPT OF EVIDENCE—Prior to the taking effect of the act of March 8, 1897, it was necessary that the record should affirmatively show filing of longhand manuscript with clerk before it was incorporated in bill of exceptions, see APPEAL AND ERROR, 20; *Fitch v. Byall, 554.*

LUCRATIVE OFFICE—When a person accepts a second incompatible lucrative office he thereby forfeits the first, and his subsequent resignation thereof will not restore his right or title to the first office, see CONSTITUTIONAL LAW, 8; *Bishop v. State, ex rel., 223.*

MALICIOUS PROSECUTION—

1. *Complaint.*—A complaint in an action for malicious prosecution must aver that the defendant acted maliciously and without probable cause. *Helwig v. Beckner, 131.*
2. *Probable Cause, a Question of Law.*—Where a special verdict is returned in an action for malicious prosecution, the question of

the probable cause for the prosecution complained of is not a fact to be found by the jury, but a question of law to be determined by the court. *Ib.*

3. *Malice a Question of Fact.*—In an action for malicious prosecution, malice is a question of fact to be submitted to and found by the jury, and without proof of malice the action cannot be maintained. *Ib.*
4. *Malice.—Evidence.*—An acquittal of defendant of the crime charged is not *prima facie* evidence that the prosecution was malicious. *Ib.*
5. *Special Verdict.—No Finding of Malice.*—Where there is no finding of malice in a special verdict returned in an action for malicious prosecution, such verdict will not support a judgment for the plaintiff. *Ib.*
6. *Inference of Malice from Want of Probable Cause.*—The court or jury trying an action for malicious prosecution may infer malice from want of probable cause, but are not required to do so. *Ib.*

MANDAMUS—

1. *Action to Compel Auditor to Issue Warrant to Trustee for Township Funds.—Defense.*—In an action against a county auditor to compel him to issue a warrant for the funds of the township, by one who is *prima facie* entitled to the office of township trustee, it is no defense that the title to the office of such trustee is in litigation. *Manor, Aud., v. State, ex rel., 310.*
2. *Township Trustee May Compel Auditor to Issue Warrant for Funds Belonging to Township.*—Where money in the hands of a county treasurer, belonging to a township, has been apportioned, the township trustee is entitled to a writ of mandamus to compel the county auditor to issue a warrant therefor. *Ib.*
3. *Prima Facie Right to Office of Township Trustee.*—Where, in an action by the State on the relation of one claiming to be a township trustee, to mandate the county auditor to issue a warrant on the county treasurer for the funds of the township, it is shown that a vacancy in the office of trustee had been judicially determined, and that the board of county commissioners had duly appointed the relator to fill the vacancy, and that he had qualified and taken the oath of office, establishes a *prima facie* right or title of the relator to the office of trustee. *Ib.*

MANSLAUGHTER—Where an indictment is in two counts, one charging murder in the first degree and the other charging involuntary manslaughter, evidence showing that the killing was intentional is admissible, see **CRIMINAL LAW**, 6; *Siberry v. State, 684.*

To constitute the crime of involuntary manslaughter while committing the unlawful act of drawing or pointing a revolver at the person killed, it need only be shown that defendant intentionally pointed the muzzle of the revolver at such person, see **CRIMINAL LAW**, 4, *Ib.*

MARRIED WOMEN—As to suretyship, see **BILLS AND NOTES**, 1, 2; *Leschen v. Guy, 17.*

MASTER AND SERVANT—

1. *Negligence in Furnishing Place to Work.—Complaint.*—In an action by an employe for damages for the failure of his employer to

furnish a safe place to work, the complaint must aver the practicability of additional appliances for the safety of employees, and that plaintiff at the time of the injury was ignorant of the dangers to which he was exposed.

Peterson v. New Pittsburg Coal, etc., Co., 260.

2. *Presumption as to Competency of Servant.*—When a person of mature years takes employment in a service, whatever the ordinary hazards, he must be presumed in the absence of allegations to the contrary, to possess knowledge and skill fitting him for the service.

Ib.

3. *Personal Injuries.*—*Fellow Servant.*—*Vice Principal.*—Where servants of a railroad company were engaged in placing a driving spring in a locomotive, and in doing so one of them, in order to force such spring into the saddle, struck same with a heavy iron, the foreman holding a torch that the blow might fall in the right place, thereby forcing the spring into place with such force as to throw a lever, bar and cold chisel, which were held by other servants in assisting to force the spring in place, and strike and kill one of such servants, the company is not liable, as the participation in the work by the company's foreman was as that of a fellow servant and not as a vice principal.

Kerner, Adm., v. Baltimore, etc., R. W. Co., 31.

METROPOLITAN POLICE COMMISSIONERS—As to validity of appointment, see MUNICIPAL CORPORATIONS, 4, 5; *City of Huntington v. Cast*, 255.

MORTGAGES—See LIENS. When mortgage to a building and loan association is a contract of suretyship as to the wife, see HUSBAND AND WIFE, 4; *Harrison Building, etc., Co. v. Lackey*, 10.

Of lands held by husband and wife as tenant by entireties, but which had been conveyed to the husband through trustee, see HUSBAND AND WIFE, 5; *Grzesk v. Hibberd, Tr.*, 354.

When receiver may be appointed to take charge of rents and profits during year of redemption, see RECEIVERS, 1; *Sweet & Clark Co. v. Union Nat'l Bank*, 305.

1. *Waiver of Priority by Senior Mortgagee.*—*Rights of Junior Mortgagee.*—Where a senior mortgagee waives his priority in favor of a junior mortgage for a larger amount, the junior mortgagee is subrogated to the rights of the senior mortgagee to the amount only of the senior mortgage.

Wayne Inter. Bldg. and Loan Ass'n v. Moats, 123.

2. *Waiver of Priority by Senior Mortgagee.*—*Mechanic's Lien.*—Where a junior mortgagee, in consideration of a waiver of priority by the senior mortgagee, agrees that he will see that the money he advances is applied to the improvement of the property, but, in violation of his agreement, permits mechanics' liens to be obtained against the property, he will be obliged to satisfy such mechanics' liens out of his prior lien, and so protect the senior mortgagee.

Ib.

3. *Foreclosure.*—*Sales.*—*Priority.*—When senior mortgage is precluded by judgment from any interest in the property as against a junior mortgage.

Tate v. Hamlin, 107.

MUNICIPAL CORPORATIONS—See STREETS.

Dedication by railroad company of highway crossings over its

tracks, see DEDICATION; *Evansville, etc., R. R. Co. v. State, ex rel.*, 276.

Condemnation of railroad right of way for street, see EMINENT DOMAIN; *City of Terre Haute v. Evansville, etc., R. R. Co.*, 174.

When injunction will lie to prevent the taking of land by a city for streets, see INJUNCTION, 2; *City of Fort Wayne v. Ft. Wayne, etc., R. R. Co.*, 25.

1. *Motive of Common Council.*—Courts will not inquire into the motive of the common council of a city in the enactment of an ordinance. *Lilly v. City of Indianapolis*, 648.

2. *Ordinance.—Amendment.—Repeal.*—Where there is an ordinance regulating the prices to be charged by companies furnishing natural gas to consumers, a subsequent amendatory ordinance which increases the price to be charged by a particular company for a certain time, does not repeal the prior ordinance, and, on the expiration of the time, the prior ordinance controls. *Thistlethwaite v. State*, 319.

3. *Common Council.—Notice.—Assumption of Jurisdiction.*—A common council acting upon a notice is an adjudication of its sufficiency, without a formal entry upon the question of notice. *City of Bloomington v. Phelps*, 596.

4. *Appointment of Metropolitan Police Commissioners.—Validity.*—Under section 1 of the act of February 28, 1897, providing for the appointment by the Governor of a board of metropolitan police commissioners within and for cities of 10,000 inhabitants according to the United States census of 1890, or according to a census taken under the authority of the mayor, the Governor's right to appoint is determined by the statement as to population certified to him by the mayor; but if the mayor's certificate is not based upon a census, such as is contemplated by the statute, the appointments have no validity. *City of Huntington v. Cast*, 255.

5. *Metropolitan Police Commissioners.—Appointment.—Census.*—Under section 1 of the act of February 28, 1897, providing for the establishment of a board of metropolitan police commissioners within and for cities of 10,000 inhabitants, according to the United States census of 1890, or according to a census taken under the authority of the mayor of such city, a census taken by the mayor must be an official enrollment of the people of the city, and must be a public document preserved in the archives of the city subject to the inspection of all those interested. *Id.*

6. *Appointment of City Commissioners.—Constitutional Law.*—Section 3629, Burns' R. S. 1894 (3166, R. S. 1881), conferring the power upon judges of the circuit courts to appoint city commissioners, is not within the inhibition of article 8, of the state constitution, that no person charged with official duties under one of the departments of state government shall exercise any of the functions of another, except as in the constitution expressly provided. *City of Terre Haute v. Evansville, etc., R. R. Co.*, 174.

7. *Contract for Street Improvements.—Best Bidder.—Estoppel.*—After street improvements have been completed, and the benefits thereof have been received, a property owner cannot object to an assessment because the contract for such improvements was let to one whose bid was slightly higher than the bid of another. *City of Bloomington v. Phelps*, 596.

8. *Street Improvements.—Collateral Attack.—Proof of Publication.—Statute Construed.*—An assessment for street improvements can.

not be collaterally attacked because the municipality failed to make a matter of record the proof of publication as required by section 481, Burns' R. S. 1894. *Ib.*

9. *Railroads.—Condemnation of Right of Way for Streets.*—By section 3623, Burns' R. S. 1894 (Acts 1891, p. 122), cities are expressly authorized to lay out, extend, and open streets and alleys across the right of way and other lands of any railroad company, without regard to the use to which they were already devoted however inconsistent therewith the second use might be.

City of Terre Haute v. Evansville, etc., R. R. Co., 174.

10. *Condemnation of Lands.*—Land once appropriated to a public use by a railroad company cannot be condemned by a city to inconsistent public uses, unless the statute expressly or by necessary implication authorizes such second appropriation. *Ib.*

11. *Condemnation of Railroad Lands for Streets.—Assessment of Damages.*—Section 3623, providing for the condemnation of railroad right of way and grounds for streets, when construed with sections 3681-3684, Burns' R. S. 1894, provides an adequate method of assessment of damages for property so appropriated. *Ib.*

12. *When Possession of Property Protected by Injunction.*—Where it is sought to take possession of the police property of a city, without authority of law, those in possession may protect their rights and the rights of the city by the remedy of injunction.

City of Huntington v. Cast, 255.

13. *Sidewalks.—Negligence.*—A city or incorporated town is liable for the negligence of its officers in the construction or repair of sidewalks.

Town of Boswell v. Wakley, 64.

14. *Sewers.—Damages for Negligent Construction.*—If deposits from a sewer constructed and maintained by a city cause a peculiar injury to the owner of docks, by preventing or materially interfering with the accustomed and lawful use of such docks, the city is liable in damages.

Peck v. City of Michigan City, 670.

15. *Appropriation for Entertainment of Convention.*—Where a city appropriated money to be used with other money raised by private subscriptions for a public purpose, and the city's appropriation is entirely expended, leaving a balance of the other funds unexpended, the city has no claim upon such other funds.

Lilly v. City of Indianapolis, 648.

MUTUAL BENEFIT ASSOCIATIONS—

Insolvency.—Receiver.—Conflict of Laws.—Where a nonresident receiver disobeyed an order of an Indiana court requiring him to account to the principal receiver residing in Indiana or be barred from sharing in the proceeds distributed by the principal receiver, the creditors participating in the funds distributed by the nonresident receiver may nevertheless also participate in the funds distributed by the principal receiver.

Cowen v. Failey, Rec., 382.

NEGLIGENCE—

In furnishing safe place to work, see MASTER AND SERVANT, 1;
Peterson v. New Pittsburg Coal, etc., Co., 260.

The failure to give statutory signals at railroad crossing is negligence *per se*, see RAILROADS, 8; *Baltimore, etc., R. W. Co. v. Conoyer, 524.*

1. *Personal Injuries Resulting from Incompetent Fellow Servants.—Complaint.*—In an action for damages for personal injuries caused

by the incompetence of fellow servants a complaint is fatally defective which does not contain an averment that the plaintiff was ignorant of the delinquencies of such servants.

Peterson v. New Pittsburg Coal, etc., Co., 260.

2. *Fellow Servant.—Employers' Liability Act.*—The exemption from the fellow servant rule of servants in charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train upon a railway, as provided by the employers' liability act, section 7088, Burns' R. S. 1894 (Acts 1893, p. 294), does not include a brakeman charged with the duty of opening and closing a switch. *Baltimore, etc., R. W. Co. v. Little, Admx.*, 167.

8. *Fellow Servant.—Employers' Liability Act.*—The exemption from the fellow servant rule, as provided by subdivision three of the employers' liability act, is intended to make corporations liable where the servant does an act or omits action in obedience to the command of the corporation, given by rule, regulation, or by-law, or through any person delegated with authority from the corporation to make the command, and not from the omission or neglect of the servant to comply with such command. *Ib.*

NEW TRIAL—Error in the finding of the trial court to be available on appeal must have been assigned in motion for new trial, see **APPEAL AND ERROR**, 10; *Siberry v. State*, 684.

1. *Cruel and Excessive Punishment Not Ground For.—Criminal Law.*—Cruel and excessive punishment is not a statutory ground for a new trial. *Ib.*

2. *Venire de Novo.*—A motion for a *venire de novo* will not be sustained unless the verdict is so defective and uncertain that no judgment can be rendered thereon. *Garrett v. State, ex rel.*, 264.

NOTICE—When notice by Clerk of Supreme Court should be served on party and not on attorney, see **APPEAL AND ERROR**, 2; *Tate v. Hamlin*, 94.

When proof of publication as to letting of contract for street improvements is not made a matter of record, see **MUNICIPAL CORPORATIONS**, 8; *City of Bloomington v. Phelps*, 596.

NUISANCE—

Limitation of Action.—Where a nuisance is of a character so permanent that it may fairly be said that the entire damage accrues in the first instance, the statute of limitation begins to run at this time. On the other hand, where the nuisance is a continuing source of injury, there is a continuing right of action.

Peck v. City of Michigan City, 670.

OFFICERS—An act creating offices the tenure of which exceed four years is in violation of section 2, article 15, of the constitution, see **CONSTITUTIONAL LAW**, 5; *Indianapolis Brewing Co. v. Claypool*, 193.

Court may appoint trustee to administer trust funds abandoned by an absconding officer, see **TRUSTS**, 1; *Shepard, Tr., v. Meridian Nat'l Bank*, 532.

What may constitute a *prima facie* right to the office of township trustee, see **MANDAMUS**, 8; *Manor, Aud., v. State, ex rel.*, 310.

Sufficiency of information to oust township trustee where he had accepted office of postmaster, see **PLEADING**, 8; *Bishop v. State, ex rel.*, 223.

1. *Sheriff Has no Right to Demand Fees in Advance.*—A sheriff, in the absence of statutory authority, cannot demand payment of his fees before serving a summons issued to him from another county. *McFarlan v. State*, 149.
2. *County Superintendent.—Appointment.—Power of County Auditor to Give the Casting Vote.—Statute Construed.*—Under section 5900, Burns' R. S. 1894 (4424, R. S. 1881), providing for the appointment of county superintendent, the county auditor is authorized to give the casting vote in case of a tie, whether such appointment is made by ballot, *viva voce* vote, or by the adoption of a motion or resolution declaring that the person therein named be appointed to fill the office. *State, ex rel. Morris, v. McFarland*, 266.
3. *Residence.—Removal.—Abandonment.*—Where a county officer by removing to another state abandons his office, he cannot by returning again to the county legally resume the office. *Relender v. State, ex rel.*, 283.
4. *Residence.—Removal.—Abandonment.—Burden of Proof.*—In an action to remove a county commissioner from office on the ground that he had abandoned the office by removing from the State, the burden was on defendant to establish that his removal was only temporary, and where the special finding is silent in this respect it will be presumed that such fact was found adversely to the party upon whom rested the burden of proving it. *Ib.*
5. *Residence.—Removal.—Abandonment.*—Where a county commissioner violates the provision of section 6, article 6 of the constitution requiring county officers actually to reside in the county in which they hold office, by voluntarily ceasing to reside therein during his term of office it will operate as an abandonment of the office, and, *ipso facto*, a surrender of all rights and title to the office. *Ib.*
6. *Residence.—County Commissioner.—Constitutional Law.*—By the provision of section 6, article 6 of the constitution requiring all county officers to reside in their respective counties, a county commissioner is required to reside in the county where he serves as such officer, not in the general sense of the term, but he is required to actually reside therein during the time he is the incumbent of the office. *Ib.*
7. *Removal.—Qualification.*—In an action to eject a county commissioner from office on account of his removal from the county, a finding that the person to succeed him as such commissioner was duly elected and commissioned as such officer shows *prima facie* that he was eligible to the office in controversy. *Ib.*
8. *Ejection.*—An action by the state on the relation of the prosecuting attorney to eject an alleged usurper from office is not a mere controversy between two persons to determine which one has the best title to the office, but the defendant must recover on the strength of his own title to the office and not upon the infirmity of that of his alleged successor. *Ib.*

OPTIONS—See SALES.

ORDINANCE—When amendatory ordinance does not repeal ordinance amended, see MUNICIPAL CORPORATIONS, 2; *Thistlethwaite v. State*, 319.

PARTIES—In an action to recover the possession of real estate, or to quiet title thereto, see QUIETING TITLE, 2; *Chapman v. Jones*, 434.

1. *Review*.—Where proceedings were instituted by mortgagors and junior mortgagees to review a foreclosure proceeding by a senior mortgagee, and during the pendency thereof a sheriff's deed is made to the senior mortgagee and his wife, the proceeding is properly continued in the name of the original parties.

Tate v. Hamlin, 107.

2. *Action to Require Treasurer of City School Board to Pay Over Unexpended Balance of School Revenue*.—In an action to require the treasurer of a city school board to pay over to the county treasurer an unexpended balance of school revenue, as provided by section 5969, Burns' R. S. 1894, it is not necessary to include with the treasurer the other members of the school board.

Starr, Treas., v. State, ex rel. Ketcham, 592.

PARTITION—As to ways of necessity in partition proceedings, see EASEMENTS, 1, 2; *Ritchey v. Welsh*, 214.

Judgment.—*Quieting Title*.—*Former Adjudication*.—In an action by a tenant in common for the partition of his moiety in the real estate so held, no issue was raised between the defendants as to the extent of their respective interests in the real estate, as between each other, where defendants did not appear to such action, but were defaulted, and a defendant therein is not estopped from asserting title to the portion of the real estate set off to her co-defendant which she held by an unrecorded deed of conveyance made prior to the partition proceeding.

Finley v. Cathcart, 470.

PARTNERSHIP—Where two persons are partners in the practice of law and one member of the firm does legal work for a client, the other partner has such an interest in the compensation for such services as to make him a proper party plaintiff in an action to recover same, see ATTORNEY AND CLIENT, 5; *French v. Cunningham*, 632.

PLEADING—See COMPLAINT; DEMURRER.

Written contracts must be pleaded, see EVIDENCE, 5; *Durfinger v. Baker*, 575.

Estoppel must be pleaded with particularity and precision, see ESTOPPEL, 1; *Dudley v. Pigg*, 363.

1. *Complaint*.—*Exhibit*.—*Summons*.—In an action to set aside a judgment for want of proper service, a copy of the summons filed with the complaint as an exhibit, but not made a part thereof, cannot be considered in determining the sufficiency of the complaint.

Fitch v. Byall, 554.

2. *Complaint*.—*Action to Set Aside Conveyance of Real Estate*.—*Description*.—A complaint, in an action to set aside the conveyance of real estate as fraudulent, which fails to describe the real estate with such certainty that when carried into the decree the judgment of the court would become effective without extraneous evidence, is bad.

Sheffer v. Hines, 413.

3. *Amended Complaint*.—*Supplemental Complaint*.—Facts existing at the time of filing the original complaint must be brought into the case by an amended complaint and not by a supplemental complaint.

Chapman v. Jones, 434.

4. *Supplemental Complaint*.—A supplemental complaint is not an amendment to the complaint, and its office is not to supply omissions or defects in the original complaint, but to bring up matters proper for litigation in such actions that have occurred since the commencement of the action.

Ib.

5. *Cross-Complaint*.—A cross-complaint, like an original complaint, must state facts sufficient to entitle the pleader to some affirmative relief, and it cannot be aided by the allegations of other pleadings in the action. *Leach v. Rains*, 152.
6. *Demurrer*.—A demurrer in the following language: "The defendant demurs to each, the first, second, third, and fourth paragraphs of the plaintiff's amended complaint, separately and severally, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action against it," challenges the paragraphs of complaint severally. *Baltimore, etc., R. W. Co. v. Little, Admr.*, 167.
7. *Demurrer*.—*Answer*.—Where an answer does not purport to answer the whole complaint, which was in one paragraph, a demurrer to such answer could not be carried back and sustained to the complaint. *State, ex rel. v. Haller*, 292.
8. *Action to Oust Public Officer Who Accepts Second Lucrative Office*.—*Sufficiency of Information*.—An information, under section 1145, Burns' R. S. 1894, to oust defendant from the office of township trustee because he had been appointed to and had accepted the office of postmaster in violation of the provision of the constitution, must negative the exception made in favor of a postmaster whose annual compensation does not exceed ninety dollars. *Bishop v. State, ex rel.*, 223.
9. *Evidence*.—*Practice*.—A written statement which is claimed to be the basis of an action is improperly admitted in evidence without pleading it, either in the form in which it was written, or for enforcement in a reformed condition. *Durflinger v. Baker*, 375.
10. *Variance*.—When the allegations of a pleading vary from the provisions of the instrument upon which it is founded, the provisions of such instrument control, and such allegations will be disregarded. *Harrison Building, etc., Co. v. Lackey*, 10.
11. *Amendments Deemed to Have Been Made After Verdict*.—Section 670, Burns' R. S. 1894, under which amendments to pleadings for any defect in form are deemed to have been made, does not apply to matters of substance which have been omitted. *Sheffer v. Hines*, 413.

PLEDGE—

Actual or Constructive Delivery of Property to Pledgee.—The delivery of purported warehouse receipts, to a creditor, by a corporation not authorized to do a warehouse business, is not a constructive delivery of the property, nor is a separation of the property from the rest of a stock of goods, without the knowledge of such creditor, an actual delivery so as to constitute a pledge.

Franklin Nat'l Bank v. Whitehead, 560.

POLICE COMMISSIONERS—As to appointment of, see MUNICIPAL CORPORATIONS, 4, 5; *City of Huntington v. Cast*, 255.

POOR PERSON—The proper remedy for failure of trial court to furnish to poor person a transcript of the evidence at the expense of the county is by an application to the Supreme Court, see CRIMINAL LAW, 19; *Miller v. State*, 607.

PRACTICE—Question of jurisdiction waived by general appearance, see APPEARANCE; *Chandler v. Citizens Nat'l Bank*, 601.

Where both parties to an action, by their pleadings treat the contract concerning the questions in issue as in parol, it is not error

for the court to find upon the oral testimony, notwithstanding the written contract, which was not pleaded, was admitted in evidence, see TRIAL, 3; *Durflinger v. Baker*, 375.

1. *Special Finding.—Motion for Judgment.*—A motion for judgment upon the special finding of facts and the conclusions of law taken together is properly overruled. *Royse v. Bourne*, 187.
2. *Special Finding.—How Conclusions of Law Are Tested.*—The proper mode of testing the validity of conclusions of law based upon a special finding is by an exception, and not by motion for judgment. *Ib.*
3. *Withdrawal of Paragraph of Complaint by Court.*—The withdrawal of a paragraph of complaint by the court is equivalent to a dismissal thereof, and no one but the plaintiff can complain of such action. *Chapman v. Jones*, 434.
4. *Harmless Error.*—Where the court withdrew a paragraph of complaint, a former ruling on a demurrer thereto although erroneous was rendered immaterial and harmless. *Ib.*
5. *Harmless Error.—Statute Construed.*—A judgment which is manifestly right under the evidence will not be reversed on account of erroneous intervening rulings. *Pearce v. Dill*, 136.
6. *Harmless Error.*—An order of court requiring a plaintiff to elect whether he would sue as trustee or receiver was immaterial and harmless, if erroneous, where the rights of recovery were the same in either capacity. *Shepard, Tr., v. Meridian Nat'l Bank*, 532.
7. *Motion to Direct Verdict.—Evidence.—Appeal.*—If a defendant in an action, upon the close of plaintiff's evidence in chief, moves the court to direct a verdict on such evidence in his favor, he must stand upon his motion; if he subsequently introduces his own evidence, he will be regarded as having waived or receded from his motion, and therefore no question can be considered on such motion on appeal. *Baltimore, etc., R. W. Co. v. Conoyer*, 524.

PRINCIPAL AND AGENT—Scope of authority of agent of building and loan association, see BUILDING AND LOAN ASSOCIATION; *Wayne International Building, etc., Association v. Moats*, 123.

PRINCIPAL AND SURETY—A married woman may plead the defense of suretyship in an action on a note payable in bank in the hands of an innocent holder, see BILLS AND NOTES, 1; *Leschen v. Guy*, 17.

Whether a married woman is principal or surety is determined by the inquiry as to whether she received the consideration for which the obligation was executed, see BILLS AND NOTES, 2; *Ib.*

When mortgage executed to a building and loan association is a contract of suretyship as to the wife, see HUSBAND AND WIFE, 4; *Harrison Building, etc., Co. v. Lackey*, 10.

A mortgage executed by husband and wife to secure husband's debt, on lands held by them as tenants by entireties, but which had been conveyed to husband, is a contract of suretyship on part of wife, see HUSBAND AND WIFE, 5; *Grzesk v. Hibberd, Tr.*, 354.

QUIETING TITLE—Declarations made at time of conveyance as evidence, see EVIDENCE, 13, 14; *Ewing v. Bass*, 1.

An action may be maintained to quiet title to lands held by an un-

recorded deed which was set off to a codefendant in a partition proceeding in which defendants did not appear, see **PARTITION**; *Finley v. Cathcart*, 470.

1. *Complaint Must Show Title in Plaintiff*.—A complaint to quiet title to real estate is bad on demurrer for want of sufficient facts to constitute a cause of action, if the facts stated therein fail to show title in the plaintiff. *Chapman v. Jones*, 434.
2. *Parties.—Statutes Construed*.—Section 1086, Burns' R. S. 1894 (1073, R. S. 1881), authorizing any person having a right to recover the possession of real estate, or to quiet title thereto, which is in the name of another person, to prosecute either action in his own name must be construed with section 251, Burns' R. S. 1894 (251, R. S. 1881), which requires all actions to be prosecuted in the name of the real party in interest. *Ib.*
3. *Plaintiff Must Recover on Strength of His Own Title*.—In an action to quiet title to real estate the plaintiff must prevail on the strength of his own title, the failure of the defendant to establish title to the real estate in question can furnish no ground for recovery. *Graham v. Lunsford*, 83.
4. *Estoppel*.—A grantor of real estate is not estopped by his covenants of warranty from asserting after acquired title to the lands conveyed as against the heirs of his grantee, where his title to such real estate was quieted in an action brought by grantee's heirs. *Ib.*
5. *Estoppel*.—A judgment rendered against defendants for costs in an action in ejectment cannot operate as an estoppel against defendants in an action by plaintiff to quiet title to such real estate. *Ib.*

RAILROADS—Are required by statute to construct crossings over tracks crossed by streets, see **HIGHWAYS**, 6, 7, 8, 9; *Evansville, etc., R. R. Co. v. State, ex rel.*, 276.

Condemnation of right of way for street, see **EMINENT DOMAIN**; *City of Terre Haute v. Evansville, etc., R. R. Co.*, 174.

1. *Construction of Bridge and Embankments*.—It is the duty of a railroad company in the construction of bridges and embankments to provide for unusual stages of water. *New York, etc., R. R. Co. v. Hamlet Hay Co.*, 344.
2. *Construction of Bridges and Embankments.—Statute Construed*.—By clause 5 of section 5153, Burns' R. S. 1894, a railroad company is empowered to construct its road across a water course so as not to interfere with the free use of the same, and "in such a manner as to afford security for life and property," and provides that the railroad company shall restore the water course "to its former state, or in a sufficient manner not to impair unnecessarily its usefulness or injure its franchises." *Held*, that the "life and property" and the "franchises" referred to in the statute are not those of the railroad corporation, but those connected with the water course. *Ib.*
3. *Damages for Obstructing Water Course.—When Action Accrues*.—A landowner's right of action against a railroad company for damages caused by the obstruction of a natural water course accrued at the time the landowner was damaged by the overflow of water. *Ib.*
4. *Liable to Landowner for Damages Caused by Obstructing Water Course*.—Where a railroad company constructs bridge embankments, and thereby obstructs a natural water course, the com-

- pany is liable in damages resulting to a landowner; and the fact that the embankments were built in a careful manner, so as to protect the charter right of the company is no defense. *Ib.*
5. *Bridges and Embankments.—Surface Water.*—Water which flows down a stream in high-water channels, having well-defined beds and banks, is not surface water against which a railroad company, in the construction of its road, has a right to build embankments. *Ib.*
6. *A Person Approaching Crossing May Presume that Statutory Signals will be Given.*—A person approaching a railroad crossing has a right to assume that the company will obey the law, by giving the required signals of an approaching train; and if such person, after having exercised due care, and employed his senses of seeing and hearing, can neither see nor hear an approaching train, he is justified in presuming that he can pass over in safety.
Baltimore, etc., R. W. Co. v. Conoyer, 524.
7. *Presumption That Person Approaching Crossing Will Look and Listen.*—The employes in charge of a railroad train have a right to presume that a traveler on a public highway, who is approaching a crossing of the railroad, will not only listen, but that he will look in each direction for approaching trains.
Cleveland, etc., R. W. Co. v. Miller, Admr., 490.
8. *Failure to Give Statutory Signals at Crossings.—Negligence.*—The failure of a railroad company to discharge its duty in regard to giving the signals at public crossings, as enjoined upon it by statute, is negligence *per se*; but to entitle an injured party to recover he must go further and show that such negligence was the proximate cause of the injury, and that he himself was not guilty of contributory negligence. *Baltimore, etc., R. W. Co. v. Conoyer, 524.*
9. *Special Verdict.—Incredible Finding.*—In an action against a railroad company for damages for injury willfully inflicted on plaintiff's intestate, a conclusion on the part of the jury that the fireman on the locomotive, when approaching a highway crossing, toward which a traveler was leisurely driving, actually knew what was in the mind of such traveler, and what he would do under the circumstances, cannot be accepted as credible.
Cleveland, etc., R. W. Co. v. Miller, Admr., 490.

RECEIVERS—When appointment of receiver not reviewable on appeal, see **APPEAL AND ERROR**, 39; *Chicago, etc., R. W. Co. v. McBeth, 78.*

Failure of nonresident receiver to comply with order of an Indiana court requiring an accounting to the principal receiver residing in Indiana, see **MUTUAL BENEFIT ASSOCIATIONS**; *Cowan v. Failey, Rec., 382.*

1. *Appointment of to Take Charge of Property in Hands of Assignee.—Rights of Mortgagee.—Rents and Profits During Year of Redemption.*—Where mortgaged property is insufficient security for the payment of the debt, a receiver may, at the instance of the mortgagee, be appointed to collect the rents and profits, or to operate the property during the year of redemption, either before or after an assignment for the benefit of creditors.
Sweet and Clark Co. v. Union Nat'l Bank, 305.
2. *Of Insolvent Corporation.—What Actions Can Be Maintained By.*—A receiver of an insolvent corporation represents the creditors as well as the stockholders, and holds the property for the benefit of

both, and, as trustee for creditors, can maintain and defend actions which the corporation could not.

Franklin National Bank v. Whitehead, 560.

3. *Insolvent Corporation.—Rights of Creditors.*—When a court has taken possession of the property of an insolvent corporation, and appointed a receiver, the property of the corporation is a trust fund for the payment of its debts, and a general creditor has a lien upon such property, and therefore has a right to intervene and contest the validity, as well as the priority of other claims or asserted liens. *Ib.*

4. *Action Against Stockholders of a Corporation to Collect Unpaid Assessments.—Jurisdiction.*—Where the stockholders of a corporation have failed to pay assessments due from them on their respective shares of the capital stock, a receiver of such corporation may join all the defendants in one action, though they may not all reside in the jurisdiction where the suit is instituted.

Gainey v. Gilson, Rec., 58.

5. *Action Against Stockholders of a Corporation to Collect Unpaid Assessments Must Be Authorized by Court.*—A complaint by a receiver of a corporation against the stockholders to collect unpaid assessments or calls due on their respective shares of stock must allege that the receiver was authorized by the court to institute the action. *Ib.*

RECORD—See APPEAL AND ERROR.

As to certification of original document, see APPEAL AND ERROR, 24; *Leach v. Mattix*, 146.

Certification of substitute for lost pleading, see APPEAL AND ERROR, 25; *Davis v. Talbot*, 80.

REHEARING—As to form of petition for, see APPEAL AND ERROR, 41; *Finley v. Cathcart*, 470; *Baltimore, etc., R. W. Co. v. Conoyer*, 524.

Questions cannot be presented for first time in petition for, see APPEAL AND ERROR, 42; *Siberry v. State*, 684; *Chapman v. Jones*, 454; *State, ex rel., v. Halter*, 292.

ROADS—See HIGHWAYS.

SALES—

Options.—Gaming.—Bucket Shops.—Sales of products which, by the mutual understanding of the buyer and seller, are not to be delivered, but when the time fixed for delivery arrives settlement is to be made upon the basis of the market value of such products, understood by the parties to be a speculation solely on chances, are illegal and void. *Pearce v. Dill*, 156.

SEWERS—City liable in damages for the negligent construction of, see MUNICIPAL CORPORATIONS, 14; *Peck v. City of Michigan City*, 670.

Appeals to Circuit Court from Assessments Prior to the Issuing of a Precept.—The provision for appeals to the circuit court from the issuing of a precept against a property owner for the collection of a sewer assessment, made by section 4298, Burns' R. S. 1894, applies where the contractor has been paid, and the city is substituted to his rights the same as in case the contractor himself applies for a precept, and an appeal taken from such assessment prior to the issuing of a precept is premature.

Chicago, etc., R. R. Co. v. City of Huntington, 518.

SPECIAL FINDING—When motion for judgment on special finding is properly overruled, see PRACTICE, 1; *Royse v. Bourne*, 187.

Where an exception is made jointly to two or more conclusions of law, if either is good the exception must fail, see APPEAL AND ERROR, 29; *Evansville, etc., R. R. Co. v. State, ex rel.*, 276.

Conclusions of law based upon a special finding are properly tested by exception and not by motion for judgment, see PRACTICE, 2; *Royse v. Bourne*, 187.

1. *Conclusions*.—A judgment rendered upon a special finding will not be reversed because the finding contained conclusions, where, disregarding such conclusions, enough facts remain to support the judgment. *Durflinger v. Baker*, 375.
2. *Must Contain the Ultimate or Inferential Facts*.—It is the inferential or ultimate facts established by the evidence which the special finding is designed to disclose and mere evidentiary facts will be disregarded. *Relender v. State, ex rel.*, 253.
3. *Amendment of by Trial Court*.—A special finding may, during the term and before the rendition of the final judgment, be amended or corrected to conform to the facts proved. *Royse v. Bourne*, 187.
4. *Venire De Novo*.—Where enough facts are found in a special finding to support a judgment thereon the remedy is not by a motion for a *venire de novo*, as the silence of the finding upon any issue is deemed a finding against the party tendering such issue. *Durflinger v. Baker*, 375.

SPECIAL JUDGE—A party waives his right to question the jurisdiction of a special judge by failing to object at the time the appointment is made, see CRIMINAL LAW, 8; *Skilton v. State*, 641.

SPECIAL VERDICT—When error in an answer to interrogatory is an error of law, see APPEAL AND ERROR, 30; *New York, etc., R. R. Co. v. Hamlet Hay Co.*, 344.

Incredible finding of jury not upheld, see RAILROADS, 9; *Cleveland etc., R. W. Co. v. Miller, Admr.*, 490.

1. *Conclusions of Law*.—Conclusions of law in a special verdict must be disregarded by the court in rendering judgment thereon. *Town of Boswell v. Wakley*, 64.
2. *Conditional Conclusion*.—The conditional conclusion of a special verdict, finding for the plaintiff if the law is with the plaintiff otherwise finding for the defendant, is not absolutely necessary to the validity of the special verdict; and this part of the verdict cannot be considered by the court in determining whether the law on the facts found is with the plaintiff or defendant. *Helwig v. Beckner*, 131.
3. *Failure to Find Fact in Favor of Party Having Burden of Proof*.—A failure to find a fact in favor of the party upon whom the burden of establishing it rests, is equivalent to an express finding against him as to that fact. *Cleveland, etc., R. W. Co. v. Miller, Admr.*, 490.
4. *Contributory Negligence*.—A finding in a special verdict in an action against a town for damages for injuries received on a defective sidewalk that plaintiff was walking slowly and carefully will not warrant the legal conclusion that plaintiff was free from contributory fault. *Town of Boswell v. Wakley*, 64.

STATUTE—

Repeal of, Pending Action Based Thereon.—A proceeding for the issue of a writ of mandate to require the treasurer of a city school board to pay over to the county treasurer a balance of unexpended school revenue, as provided by section 5969, Burns' R. S. 1894, was not affected by the enactment, after the suit was begun, of the act of March 7, 1895 (Acts 1895, p. 153), repealing the former statute and providing another mode for the enforcement of the liability. *Starr, Treas., v. State, ex rel. Ketcham, 592.*

STATUTORY CONSTRUCTION—For table of statutes cited and construed see page xxvi.

An amendatory statute defining an offense and fixing the penalty for the violation thereof in substantially the same language as that employed in the statute it amends, is not a repeal but a reenactment of the statute, see **CRIMINAL LAW**, 21; *State v. Kates, 46.*

1. *Amendments.*—An amendatory act and the amended statute are to be construed as one. *Pomeroy v. Beach, 511.*
2. *Repeal of Statute by Implication.*—The repeal of statutes by implication is not favored, and where there are two statutes upon the same subject they should be construed so that both will stand, if possible. *Id.*

STENOGRAPHER—As a witness to prove the testimony of a particular witness at a former trial, see **APPEAL AND ERROR**, 38; *Sidberry v. State, 684.*

STREETS—See **HIGHWAYS**. When contract for improvement not let to the lowest bidder, see **MUNICIPAL CORPORATIONS**, 7; *City of Bloomington v. Phelps, 596.*

As to condemnation of railroad right of way for, see **MUNICIPAL CORPORATIONS**, 9, 11; *City of Terre Haute v. Evansville, etc., R. R. Co., 174.*

Railroad companies are required by statute to construct crossings over tracks crossed by streets, see **HIGHWAYS**, 6, 7, 8, 9; *Evansville, etc., R. R. Co. v. State, ex rel., 276.*

Condemnation of Lands For.—City Commissioners.—Appointment.—The use of the words circuit court in section 3629, Burns' R. S. 1894 (3166, R. S. 1881), in designating who should make the appointment of city commissioners, was intended to confer said jurisdiction upon the person who held the office of circuit judge, and not upon the court as a court.

City of Terre Haute v. Evansville, etc., R. R. Co., 174.

SUBMISSION OF CONTROVERSY—

1. *Appeal and Error.—Exception.*—In order to present any question on appeal from a decision of the trial court on an agreed case an exception must be saved to the decision or finding of the court. *City of Shelbyville v. Phillips, 552.*
2. *Appeal and Error.—Record.*—Where the record does not show that the facts agreed upon constituted all of the evidence in the trial of a cause on an agreed statement of facts it will be presumed that the facts relied upon by the court were such as to justify the finding. *Id.*

3. *Agreed Case.—Jurisdiction.*—The court has no jurisdiction to hear and determine a cause submitted as an agreed case, under section 562, Burns' R. S. 1894 (553, R. S. 1881), where no affidavit was made that the controversy was real, and that the proceedings were brought and submitted in good faith. *Ib.*

SUBROGATION—One holding a claim against a beneficiary of a will for support and maintenance may be subrogated to the rights of such beneficiary where, by the terms of the will, such support and maintenance is made a charge against the real estate devised, see *WILLS*, 10; *Clark v. Marlow*, 41.

SUMMONS—A copy of the summons filed with the complaint, as an exhibit but not made a part thereof, in an action to set aside a judgment for want of proper service, cannot be considered in determining the sufficiency of the complaint, see *PLEADING*, 1; *Fitch v. Byall*, 554.

SUPPLEMENTAL COMPLAINT—The office of a supplemental complaint is to bring up matters that have occurred since the commencement of the action, see *PLEADING*, 4; *Chapman v. Jones*, 434.

SUPREME COURT—As to rules of, see *APPEAL AND ERROR*, 14; *Manns Bros., etc., Co. v. Templeton*, 706.

SURETY—See *PRINCIPAL AND SURETY*

TAXATION—Admission of deputy treasurer, since deceased, that taxes had been paid is admissible as evidence in an action to enjoin a sale of real estate for delinquent taxes, see *EVIDENCE*, 6; *Keesling, Treas., v. Powell*, 372.

1. *Failure to List Property.—Foundation of Action.—Complaint.*—In an action to recover the penalty provided by section 8458, Burns' R. S. 1894, for failure to list property for taxation the alleged fraudulent tax lists given are not the foundation of the action and need not be filed with the complaint. *State, ex rel. v. Halter*, 292.
2. *Failure to List Property.—Complaint.*—In an action under section 8458, Burns' R. S. 1894, to recover penalties for failure to list property for taxation for more than one year, the cause of action for each year should be stated in a separate paragraph of complaint. *Ib.*
3. *Failure to List Property.—Penalty.—Action For.*—The State has a separate action under the tax laws of 1881 and 1891 for each year a taxpayer gives a false or fraudulent list, schedule, or statement, or fails or refuses to deliver to the assessor a list of taxable property which he is required to list. *Ib.*
4. *Action for Failure to List Property.—Action by State.*—The fact that section 8458, Burns' R. S. 1894, fixing a penalty for failure to list property for taxation authorizes the prosecuting attorney to bring an action for the violation thereof, instead of the Attorney-General, and provides that the proceeds thereof be paid into the county treasury, instead of the State treasury, in no way changes the public nature of the proceeding. *Ib.*
5. *Action for Failure to List Property.—Repealed Statute.*—By virtue of the provisions of section 248, Burns' R. S. 1894 (248, R. S. 1881), penalties and forfeitures incurred by taxpayers under section

6839, R. S. 1881, may be recovered the same as if said section had not been repealed by the tax law of 1891. *Ib.*

6. *Tax Certificates*.—Tax certificates are property, and are taxable under the tax law of 1891, as amended by the act of 1895, Acts 1895, p. 26. *Ib.*

TOWNSHIP TRUSTEE—May compel auditor of county to issue warrant for township funds, see *MANDAMUS*, 1, 2; *Manor, Aud. v. State, ex rel.*, 310.

1. *Lucrative Office*.—The office of township trustee is a lucrative office. *Bishop v. State, ex rel.*, 223.
2. *May Maintain One Action for Funds Belonging Both to the Civil and School Townships*.—The trustee of a civil township is *ex officio* trustee of the school township, and entitled to the funds of both; and as trustee of the civil township may maintain one action for money wrongfully withheld, although the money belongs partly to each fund. *Manor, Aud. v. State, ex rel.*, 310.
3. *Power of, to Redistrict Township for School Purposes*.—*Statute Construed*.—The act of February 7, 1893 (Acts 1893, p. 17), providing for the relocation of school houses, in no way changes the power of the township trustee to redistrict his township for school purposes, and abolish school districts, when no new school houses are built, or the sites of those already existing in districts not abolished, are not changed. *State, ex rel. v. Wilson, Tr.*, 253.

TRIAL—

1. *Examination of Witness*.—It will not be presumed that the trial court permitted an improper examination to continue, over objections sustained by it until it was itself prejudiced in favor of the examining party. *Miller v. Dill*, 326.
2. *Introduction of Evidence out of Regular Order*.—*Discretion of Court*.—The introduction of evidence out of its regular order is within the sound discretion of the trial court, and, unless made to appear as an abuse of discretion, is not error. *Ib.*
3. *Theory*.—*Practice*.—*Special Finding*.—Where both parties to an action, by their pleadings treat the contract concerning the questions in issue as in parol, no error was committed by the court in finding upon the oral testimony, notwithstanding the written contract, which was not pleaded, was admitted in evidence. *Durfinger v. Baker*, 375.

TRUST DEEDS—

Revocation.—Where a son twenty-two years of age having no business capacity or business experience, intemperate in habits and easily influenced, conveyed to his father, a man of great ability and force of character, his entire estate, valued at \$50,000.00, in trust, and at the death of such son to descend to his legal representatives, for a nominal consideration of \$600.00, which was never in fact paid, the understanding between the father and son at the time being that such conveyance should only be temporary, such deed being so unconscionable and so impressed with undue influence could not be upheld in equity, and a reconveyance of the property by the father to the son was an act which equity and good conscience required, and the legal representatives of the son at his death had no title to such lands which he had conveyed to *bona fide* purchasers after such reconveyance. *Ewing v. Bass*, 1.

TRUSTS—Express or direct and continuing trusts are not within the statute of limitations, see *LIMITATION OF ACTIONS*, 9, 10; *Jones Exr., v. Henderson*, 458.

1. *Absconding Officer. — Court may Appoint Trustee to Administer Trust Funds.*—The court may, under the provisions of section 3418, Burns' R. S. 1894 (2996, R. S. 1881), appoint a trustee to take charge of trust funds abandoned by an absconding county clerk and collect and administer them in the interest of the beneficiaries entitled to them in the absence of such clerk or of anyone authorized and willing to act for him.

Shepard, Tr., v. Meridian Nat'l Bank, 532.

2. *Action to Recover Funds Belonging to Cestuis Que Trust.*—An action may be maintained by a trustee appointed by the court to take charge of trust funds abandoned by a county clerk, to recover funds embezzled by such clerk without making the *cestuis que trust* plaintiffs in such action. *Ib.*

3. *Power of Trustee to Maintain Action to Set Aside Fraudulent Transfer of Assets.*—One appointed by the court to take charge of trust funds abandoned by an absconding county clerk, and administer same for the benefit of the *cestuis que trust*, may maintain an action to set aside a transfer of assets made by such clerk in fraud of the trust, the transferee having knowledge of the trust and participating in the fraud. *Ib.*

4. *Recovery of Funds Misapplied by Trustee. — Officers.*—Funds held by a county clerk, as such officer, and wrongfully applied to the payment of his individual liabilities, the creditor having knowledge of the trust and knowing that the money so applied was trust funds, may be recovered in an action by a trustee for the use and benefit of the *cestuis que trust*. *Ib.*

5. *Recovery of Trust Funds Wrongfully Diverted.*—Whenever any property or fund in its original state has been impressed with the character or nature of a trust, no subsequent change of its original form or condition can divest it of its trust character so long as it is capable of being identified, and the beneficiary thereof may pursue and reclaim it regardless of the form into which it may have been changed, provided it has not gone into the possession of a *bona fide* purchaser without notice. *Pearce v. Dill, 136.*

6. *Recovery of Trust Funds Wrongfully Diverted. — Identification.*—Where trust funds consisting of money have been wrongfully diverted, the *cestui que trust* may reclaim same, although not able to trace the identical coins or bills, where the identity thereof as a fund can be ascertained. *Ib.*

7. *Recovery of Funds Wrongfully Diverted. — Options. — Banks and Banking.*—Funds on deposit in bank which have been checked out by the husband of the depositor in settlement of illegal deals in options, and placed to the credit of the broker, may be recovered from the bank by the depositor, where the husband had no authority to draw checks on such deposit except in transaction of the depositor's business and for her use, of which the broker and bank had notice, and where the bank had notice of the nature of the deals for which the checks were given. *Ib.*

VENIRE DE NOVO—See **NEW TRIAL**.

Where enough facts are found in a special finding to support a judgment thereon the remedy is not by a motion for a *venire de novo*, as the silence of the finding upon any issue is deemed a finding against the party tendering such issue, see **SPECIAL FINDING**, 4; *Durflinger v. Baker, 375.*

VERDICT—See **SPECIAL VERDICT**.

up the invalidity of the will upon which plaintiff bases his title to such real estate, and thereby contest the validity of such will without filing a bond, as provided by section 2767, Burns' R. S. 1894 (2597, R. S. 1881), regulating the contest of wills. *Putt v. Putt*, 30.

12. *Contest.—Practice.—Harmless Error.*—Where a will is set aside on the grounds of mental incapacity of testator and undue influence, such judgment will not be reversed on account of error of the court in its rulings in respect to the issue of unsoundness of mind alone, where the verdict and finding were sufficient to support the judgment on either of such grounds of contest independently of the other. *Id.*

WITNESSES—See EXPERT TESTIMONY.

Shorthand reporter as witness, see **APPEAL AND ERROR**, 38; *Siberry v. State*, 684.

Cross-Examination.—Discretion of Court.—The extent to which the cross-examination of a witness may be carried rests within the discretion of the trial court, and the Supreme Court will not interfere therewith, on appeal, unless a clear abuse of such discretion is shown. *Shields v. State*, 335.

WORK AND LABOR—

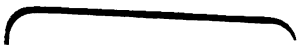
Contract.—Breach Of.—Measure of Damages.—Quantum Meruit.—When a person is performing services according to the contract of employment and is prevented from completing the same by the employer, in violation of the terms of the contract, the employe can recover the reasonable value of his services, not exceeding the contract price, on the *quantum meruit*, or he may sue upon the contract for the breach thereof, and the measure of damages is the amount that will compensate him for the reasonable value of his services, as well as his loss, if any, on account of not having been permitted to complete the contract.

French v. Cunningham, 632.

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WORK AND LABOR—

Contract.—Breach Of.—Measure of Damages.—Quantum Meruit.

—When a person is performing services according to the contract of employment and is prevented from completing the same by the employer, in violation of the terms of the contract, the employe can recover the reasonable value of his services, not exceeding the contract price, on the *quantum meruit*, or he may sue upon the contract for the breach thereof, and the measure of damages is the amount that will compensate him for the reasonable value of his services, as well as his loss, if any, on account of not having been permitted to complete the contract.

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